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ABSTRACT

The manual for due process hearing officers in Utah provides information on prehearing activities, hearing activities, decision making processes, and final reporting on hearings regarding conflicts or disagreements between the parents and the school district concerning the most appropriate educational program for the handicapped child. An introductory section provides background information on the handicapped child's right to an education, definitions used in the manual, general information for the hearing officer, the roles and responsibilities of the hearing officer, and responsibilities of the parent and the local education agency in a due process hearing. Section II outlines prehearing activities and offers sample correspondence the hearing officer may utilize for his specific responsibilities before conducting the hearing. A third section deals with activities in conducting the hearing, including the opening statement, closing statement, and recording. A final section deals with the decision making process and writing the final report. Sections include questions on the materials covered (along with references to the appropriate page in the manual), checklists, and sample forms. Appendixes contain an amended annual plan, a sample opening statement, sample closing statement, constitutional and legislative background information, rules and regulations for P.L. 94-142 (the Education for All Handicapped Children Act), sample cases, notes on writing the decision, a paper on the prehearing conference, information on jurisdiction of due process hearing officers, challenges to impartiality of hearing officers, and the institutional child's claim to special education. (SB)

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THE IMPARTIAL HEARING OFFICER:

A PROCEDURAL SAFEGUARDS TRAINING MANUAL FOR UTAH

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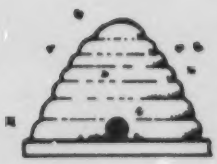

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I. INTRODUCTION

SECTION I

Goal

The participants will be given an introduction to due process in Section I. Upon completion of reading these materials, the participants will be able to answer specific questions as they relate to due process with 80% accuracy. These questions will be taken from the following specific objectives for Section I.

1. Be able to identify (by marking) the five conditions under which a due process hearing may be necessary.
2. Be able to identify (by marking) the two landmark cases that give precedent to the right to education for handicapped children.
3. Be able to identify (by marking) the constitutional amendments that are utilized as the basic formulation for the right to education for handicapped children.
4. Be able to identify (by marking) one alternative to due process hearings.
5. Be able to identify (by marking) how the State has complied with P.L. 94-142.
6. Be able to match terms with their definitions.
7. Be able to identify (by marking) the qualifications of a Due Process Hearing Officer (DPHO).
8. Be able to identify (by marking) how a Due Process Hearing Officer (DPHO) is selected.
9. Be able to list who may request an impartial hearing.
10. Be able to identify (by marking) how a hearing should be requested.
11. Be able to identify (by marking) the duties of the educational agency when a hearing has been requested.
12. Be able to identify (by marking) the timelines for scheduling a hearing.
13. Be able to identify (by marking) who initially informs the parents of their rights regarding due process.
14. Be able to list the rights of <u>all</u> participants in due process hearings.
15. Be able to list the <u>additional</u> rights of parents in due process.
16. Be able to identify (by marking) what is the role of legal counsel if he/she is representing a witness.

17. Be able to identify (by marking) the role of legal cousel if he/she is representing the respondent or the petitioner in due process.

18. Be able to identify (by marking) the average length of a due process hearing.

19. Be able to identify (by marking) the educational disposition of the child involved in due process.

20. Be able to identify (by marking) what happens if one of the parties in a due process hearing requests a postponement.

21. Be able to list the responsibilities of the Due Process Hearing Officer.

22. Be able to identify (by marking) what the Due Process Hearing Officer's decision is based upon.

23. Be able to identify (by marking) what the Due Process Hearing Officer's decision should include.

24. Be able to identify (by marking) how the Due Process Hearing Officer informs the education agency and parent of his/her decision.

25. Be able to identify (by marking) how much time the Due Process Hearing Officer has to make a decision.

26. Be able to list the two processes for appealing the decision of the Due Process Hearing Officer.

27. Be able to identify (by marking) what happens if there is an objection to testimony during the hearing.

28. Be able to identify (by marking) how witnesses are compelled to testify at the hearing.

29. Be able to identify (by marking) who has the burden of proof in a due process hearing.

30. Be able to identify (by marking) who may request an independent evaluation of the child.

31. Be able to identify (by marking) the constraints for submitting evidence.

32. Be able to identify (by marking) what the Due Process Hearing Officer should do regarding his/her own educational philosophy.

33. Be able to identify (by marking) the parental responsibilities when parents have officially requested a due process hearing.

34. Be able to identify (by marking) what a Due Process Hearing Officer <u>is not</u> in his general role.

35. Be able to identify (by marking) the school district's responsiblities in a due process hearing.

INTRODUCTION

The purpose of this Due Process Hearing Officer's Procedures Manual is to outline clearly and concisely relevant information concerning due process procedures the hearing officer needs to support the design and operation of a due process hearing. Therefore, the manual addresses information regarding pre-hearing activities, hearing activities, decision making processes, and final reporting.

As the hearing officer role is a relatively new one in education, the manual serves as a guideline for required due process procedures and provides checklists to ensure that the due process rights of the handicapped child, his parents and school district are protected.

Due process of law essentially means that the principles and procedures which guarantee fair treatment and the protection of the rights of all individuals are implemented. In special education, due process requires fair procedures when and if changes are made or proposed in a child's educational program.

A hearing would be required when there are conflicts or disagreements between the parents and the school district concerning the most appropriate educational program for the handicapped child. The hearing provides an opportunity for the parents and the school to present their views before an unbiased individual, the Due Process Hearing Officer (DPHO). The DPHO is responsible for reaching a fair and impartial decision about the child's educational program based upon the evidence and testimony of the case and the best interests of the child.

There are five conditions under which a due process hearing may be necessary. In each instance the issues are somewhat different. These five conditions are as follows:

1. Hearings on the provision of notice: An example of such a situation would be where a parent initially gives consent to a placement, but later revokes this consent, arguing that a full explanation of parental rights was not provided.

2. Hearings on identification: A Hearing Officer may encounter a situation where screening has identified a child as potentially handicapped and the parent requests a hearing claiming that the child is not handicapped and should not have been thus identified, or the parents claim that the child is handicapped and the school disagrees.

3. Hearings on evaluation: In such a situation, an agency may seek to evaluate a child after parental refusal to consent to evaluation.

4. Hearings on placement: In this type of hearing, there is likely to be a difference in the party's concept of the most appropriate placement.

5. Hearings on the provision of a free appropriate public education: This situation may arise when the parent initiates a hearing to request public school placement for a child in a private facility.

The procedures presented in this manual have been developed to allow for optimum procedural fairness and simplicity of administration. The procedures which are presented in this manual comply with the federal and state requirements and are for the ultimate purpose of insuring a judicious decision regarding the identification, evaluation, and placement of handicapped children, and to assure that all such children receive a free appropriate public education in line with both the letter and spirit of the law. Participants who successfully complete this training program will be certified by the Utah State Education Agency as qualified hearing officers.

HOW TO USE THE MANUAL

The procedures outlined in the manual are based on a fairly complex hearing, involving issues of identification, evaluation and placement and the provision of a free appropriate public education. It is obvious that no two due process hearings will be the same, therefore, a complete review and knowledge of the procedures and examinations are advantageous for all persons serving as Due Process Hearing Officers.

The manual is divided into four main sections:

- An introduction to due process. This section provides orientation information to the DPHO. It provides background information on the handicapped child's right to an education, definitions used in the manual, general information for the DPHO, the roles and responsibilities of the DPHO, LEA and the parents.

- The second section outlines the pre-hearing activities of the DPHO. This section includes pre-hearing activities and sample correspondence that the DPHO may utilize for his specific responsibilities before conducting the hearing.

- The third section deals with those activities in conducting the hearing. It includes the procedural safeguards of a due process hearing and has checklists to act as a guide in making sure those safeguards have been provided both the parents and the school.

- The final section deals with the decision making process and writing of the final report. This section has a suggested format for the final report.

The manual also contains appendices which include the rules and regulations for the State. Included in these appendices are the definitions of each handicapping condition and the criteria for assessing each condition.

BACKGROUND - RIGHT TO EDUCATION

The basis for the current right to education cases may be traced to the landmark decision in Brown v. The Board of Education in 1954. In this decision, the United States Supreme Court Stated:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today, it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. (347 U.S. 483, 493)."

The Brown decision related to public school segregation on the basis of race, but the fundamental positions in the decision formed the basis of future arguments relating to handicapped children.

There is no U.S. Constitutional protection directly relating to the right to education for handicapped children. However, the most useful concepts pertinent to the basic formulation of a right to education agreement originate from principles set forth in the Fifth and Fourteenth Amendments to the Constitution: equal protection and due process. Due process relates to the utilization of fair procedures in reaching a determination and equal protection relates to the idea that individuals in similar circumstances must receive similar treatment.

These two concepts are stated clearly in the landmark cases regarding the right to education for handicapped children: Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania [334 F. Supp. 1257 (E.D. Pa. 1971)] and Mills v. Board of Education of District of Columbia [348 F. Supp. 866, (D.D.C. 1972)].

The PARC case was brought before the court by the parents of 14 mentally retarded children and all other children who were mentally retarded (class action).

The PARC case sought to obtain and guarantee a public supported education for all mentally retarded children in the state. Prior to ruling on the question of this right, the court approved a stipulation which provided that "no child who is mentally retarded or thought to be mentally retarded can be assigned initially or re-assigned to either a regular or special educational status, or excluded from a public education without a prior recorded hearing before a special hearing officer." In addition, the court outlined a comprehensive 23 step due process procedure to be utilized in making any changes relating to the educational status of a mentally retarded child. The court in the PARC case stated that:

> " . . . a mentally retarded person can benefit at any point in his life and development from a program of education."

The court, in its belief in the benefits of an education, went on to require the state to locate, evaluate, and re-evaluate all school-aged children who had been excluded from the public school. Public schools were required to provide to all retarded children a free, appropriate education preferably in a regular classroom.

The PARC decision specifically concerned mentally retarded children. The Mills decision, however, extended the due process procedures applied in PARC to include all handicapped children. The Mills case established two basic safeguards applying to the public education of handicapped children: 1) exclusion from a public school program could not take place unless suitable alternative educational services were provided, and 2) there must be a prior due process hearing and periodic review of the child's educational status and progress.

Both PARC and Mills established an increasingly important educational concept that has come to be termed "the least restrictive

environment". The foundation of this concept as stated in PARC is:

> ". . . among the alternative programs of education and training required by statute to be available, placement in a regular public school class is preferable to placement in a special public school class, and placement in a special public school class is preferable to placement in any other type of education and training (343 F. Supp., 307)."

In 1975, Congress reacted to increasing parental demands, and judicial decisions regarding the right to education for handicapped children by passing the Education for All Handicapped Children Act, Public Law 94-142. Congress recognized that the education of all children is a responsibility of the State government, however, there is also a federal responsibility of providing financial assistance to the states in order to provide additional funds for the education of handicapped children. In return for these funds, Public Law 94-142 requires each state to adopt policies and procedures which are consistent with the law and which guarantee the right to education for all handicapped children.

The State of Utah has complied with this requirement by adopting and submitting an Annual Program Plan, under Public Law 94-142, Part B, Education For All Handicapped Children Act. The State has demonstrated in this plan that it has established procedural safeguards as required by the Act. The plan guarantees every parent the right to a due process hearing and sets forth standards that local boards of education must follow in establishing and implementing a hearing procedure for any parent within their district. (See Appendix A for the section of the Plan dealing with due process)

The due process procedures are designed to protect against arbitrary and, at times erroneous decisions on the part of both schools and parents. It should be noted that there is one alternative to this formal process. This alternative is that of mediation through informal conference meetings

between the school and the parents. This would allow both parties the opportunity to open communications and resolve differences on what is the most appropriate education for the child. In the event, that these informal alternatives do not produce the desired outcome, the mediation process may not be used to delay or deny a parent's right to a due process hearing.

DEFINITIONS

DEFINITIONS[1]

"Parent" - The term "parent" includes a natural mother or father, an adoptive mother or father, a legally appointed guardian, a surrogate parent for a child appointed pursant to procedures set out herein. The term "parent" also includes the child if he has reached the age of majority.

"Notification" - Terms such as "notice" and "notification" include: 1) written statements in English and in the primary language of the parent's home, and 2) oral communication in the primary language of the home.

"Impartial Hearing Officer" - The term "impartial hearing officer" means a person or tribunal of persons assigned to preside at a due process hearing and whose duty it is to assure that proper procedures are followed and that the rights of the parties are protected.

"Days" - means official work days.

"Surrogate Parent" - means a person appointed to act in place of parents or guardians when a child's parents or guardians are not known, are unavailable, or the child is a ward of the state. Surrogate parents will not be employees of the State Educational Agency (SEA) or Local Educational Agency (LEA) involved in the education or treatment of children. The function of the surrogate parent will be to represent the child's interest in the same way that a parent or guardian would be expected to represent the child's interest.

"Handicapped Person" - one who deviates from the average or normal person (1) in mental characteristics, (2) in sensory abilities, (3) in neuromuscular or physical characteristics, (4) in social or emotional behavior, (5) in learning and communication abilities, or (6) in multiple handicaps to such an extent that he requires a modification of school practices, or special educational services in order to develop to his maximum capacity.

"LEA" - The term "LEA" means a public board of education or other public authority legally constituted within a state for either administrative control or direction of, or to perform a service function for public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a state.

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[1]In generating these definitions the following documents were reviewed:

Amended Annual Program Plan for FY 1978, Under PL 94-143, Part B, Education For All Handicapped Children Act. Utah State Board of Education, July 7, 1977.

Federal Rules and Regulations, Education of all Handicapped Children Act. Federal Register, Tuesday, August 23, 1977.

"Public Agency" - The term "public agency" includes the State Education Agency, local agencies, intermediate educational agencies, and any other political subdivisions of the State which are responsible for providing education to handicapped children.

"Confidential Information Usage" - The term "confidential information usage" is interpreted to include the disclosure of any data entry form or the use of information for any purpose other than that for which it has been collected.

"Verbal Testimony" - The term "verbal testimony" means the comments and statements given by witnesses, under oath, during the hearing and are subject to cross-examination.

"Written Testimony" - The term "written testimony" refers to testimony obtained from a party or witness by means of a simple written statement, an affidavit (sworn, written statement), or a deposition (statement taken under oath and subject to cross-examination).

"Evidence" - The term "evidence" means those documents, verbal testimony, and/or written testimony introduced into the record of the hearing.

"Transcript" - The term "transcript" means a copy of any kind; a representation.

"Compelled Witness" - The term "compelled witness" means those witnesses who have been issued a subpoena to appear and testify at the hearing.

GENERAL INFORMATION

GENERAL INFORMATION FOR

THE DUE PROCESS HEARING OFFICER

WHAT IS AN IMPARTIAL DUE PROCESS HEARING?

When a disagreement occurs about any matter relative to: 1) the identification; 2) the evaluation; 3) the educational placement; or 4) when the provision of a free public education to the child cannot be resolved through informal conferences or discussions, an opportunity is provided for parents and school district or agency personnel to meet before an unbiased individual, the Impartial Due Process Hearing Officer (DPHO). The Impartial Due Process Hearing Officer listens objectively to both sides of the controversy, then presents his/her decision based upon the facts and testimony presented during the hearing.

WHAT IS AN IMPARTIAL DUE PROCESS HEARING OFFICER?

An Impartial Due Process Hearing Officer is free from favoritism or bias and is fair. His/her duty is to assure that proper procedures are followed during the hearing and that the rights of both parties are protected. The DPHO has successfully completed an approved training program.

WHAT ARE THE QUALIFICATIONS OF THE DUE PROCESS HEARING OFFICER?

1. Shall successfully complete a training program for impartial due process hearing officers approved by the Utah State Office of Education.
2. Shall be sufficiently free of other obligations to complete the duties and responsibilities of the Impartial Due Process Hearing Officer.
3. Shall be over the age of majority.
4. Shall not be an employee or officer of the involved agency.
5. Shall not have a personal or professional interest which would conflict with his or her objectivity in the hearing.

6. Shall not have been involved in any previous decisions regarding the child's identification, evaluation, placement or review.

HOW ARE HEARING OFFICERS SELECTED?

The LEA initiates due process procedures upon a written request and informs the State Educational Agency that a hearing will be held on behalf of the child. The LEA selects from the register a hearing officer who has successfully completed the Utah State Office of Education approved training program and assigns that Hearing Officer to the case.

WHEN ARE HEARINGS REQUESTED?

1. Hearings on the provision of notice: An example of such a situation would be where a parent initially gives consent to a placement, but later revokes this consent, arguing that a full explanation of parental rights was not provided.
2. Hearings on identification: A Hearing Officer may encounter a situation where screening has identified a child as potentially handicapped and the parent requests a hearing claiming that the child is not handicapped and should not have been thus identified.
3. Hearings on evaluation: In such a situation, an agency may seek to evaluate a child after parental refusal to consent to evaluation.
4. Hearings on placement: In this type of hearing, there is likely to be a difference in the party's concept of the most appropriate placement.
5. Hearings on the provision of a free appropriate public education: This situation may arise when the parent initiates a hearing to request public school placement for a child in a private facility.

WHO MAY REQUEST AN IMPARTIAL HEARING?

A hearing may be requested by:

1. the parents;
2. other persons having primary care and custody of the child;
3. the child (over age 18); or
4. the local school district.

HOW SHOULD A HEARING BE REQUESTED?

Request should be made, in writing to the local school district Board of Education, through the superintendent who is its executive officer.

WHAT ARE THE DUTIES OF THE LOCAL SCHOOL DISTRICT WHEN A HEARING HAS BEEN REQUESTED?

The local education agency will provide that all hearings, reviews, and other actions are carried out expeditiously, with fair consideration of the issues involved, in a hearing which must be completed and decision rendered within 45 days of the initial request. The hearing will be held at times and places reasonably convenient to the parents of the child involved and the school.

WHAT DOES THE IMPARTIAL DUE PROCESS HEARING OFFICER DO INITIALLY UPON RECEIVING A REQUEST FOR A HEARING?

The Hearing Officer will provide to the parents and to the officials of the LEA notification as to the time and place of the hearing, which shall be completed within 45 days of the parents' or school's request, and shall be at a time and place reasonably convenient for both parties.

WHO INFORMS THE PARTICIPANTS IN THE HEARING OF THEIR RIGHTS REGARDING DUE PROCESS?

Initially, the LEA notifies the parents in writing of their procedural rights in the hearing. The impartial due process hearing officer should reaffirm these rights to both the parents and the LEA in his letter of notification of the hearing.

WHAT ARE ALL THE PARTICIPANT'S RIGHTS IN A HEARING?

The rights include:

1. the right to have representatives, including, but not limited to, legal counsel or other professional persons, attend the hearing;
2. the right to present evidence;
3. the opportunity to question all witnesses at the hearing;
4. the right to a verbatim record of the hearing; and
5. a right to appeal the decision.

DO THE PARENTS HAVE OTHER RIGHTS?

Yes, the parents have <u>additional</u> rights which include:

1. the right to a timely notice of the hearing;
2. the right of access to their child's school records;
3. the right to designate others who may have access to their child's school records;
4. the right to an independent evaluation of their child;
5. the right to determine whether or not their child should attend the hearing;
6. the right to an interpreter if their primary language is not english or they are deaf; and
7. the right to determine if the hearing will be open or closed.

MUST THE PARENT BE REPRESENTED BY LEGAL COUNSEL?

No, the parents have the option of deciding whether or not they will be represented by legal counsel or represent themselves. In some cases, they may choose to be represented by advocates with special knowledge or training.

WHO INFORMS THE PARENTS OF FREE/LOW COST LEGAL SERVICES?

The Utah State Office of Education and public Agencies will establish and maintain a register of free or low cost legal services, which it will make available to the parents when the parents request this information in writing. In the event that a parent requests a hearing and the agency initiates a hearing, the agency will make this information available to the parents as a part of the notice.

WHAT HAPPENS IF THE PARENTS OR EDUCATION AGENCY IS REPRESENTED BY LEGAL COUNSEL?

If either side (parents or the education agency) is represented by legal counsel, the legal counsel may call witnesses, ask them direct questions, and cross-examine witnesses for the opposing side. In addition, they may present the opening and closing statements for the party they are representing.

WHAT HAPPENS IF A WITNESS IS REPRESENTED BY LEGAL COUNSEL?

The legal counsel for a witness may only advise the witness on the testimony. He may not ask questions, cross-examine or participate in the hearing other than advising his client.

HOW LONG DOES A HEARING TAKE?

A hearing usually lasts six to eight hours. The time may be longer depending upon the number of witnesses and types of testimony. The DPHO should allow ample time for testimony. However, the Due Process Hearing Officer should be sure to keep the testimony to the facts that are related to the issues of the hearing.

WHAT IS THE EDUCATIONAL DISPOSITION OF THE CHILD INVOLVED IN DUE PROCESS?

The child remains in his present educational placement during the pendency of all proceedings. If the issue is the provision of a free appropriate public education to a child who is not currently receiving such, the child is placed in the public school with parental permission until the Due Process Hearing Officer renders the decision.

WHAT IF ONE OF THE PARTIES INVOLVED IN THE HEARING REQUESTS A POSTPONEMENT?

It is up to the discretion of the Due Process Hearing Officer and is a judgmental decision. If the DPHO judges that the request is reasonable he may postpone the hearing to a later date that is satisfactory to both the petitioner and the respondent.

WHAT ARE THE RESPONSIBILITIES OF THE DUE PROCESS HEARING OFFICER?

The responsibilities of the due process hearing officer are to:

1. complete the training program;
2. make all arrangements to hold the hearing;
3. notify all parties of their rights and responsibilities and of any arrangements or decisions which may affect them;
4. conduct the hearing;
5. write a report about the hearing which includes the decision the due process hearing officer has made; and
6. assure that copies of the report are sent to all parties affected by the decision of the impartial due process hearing officer.

WHAT IS THE DECISION OF THE DUE PROCESS HEARING OFFICER BASED UPON?

The decision of the hearing officer should be based solely on the evidence and testimony presented at the hearing.

WHAT SHOULD THE DECISION OF THE HEARING OFFICER INCLUDE?

The decision of the hearing officer will include findings of fact, conclusions, and reasons for these findings and conclusions. If the decision is to disapprove a proposed education program, it should include a statement as to what is an adequate and appropriate educational program for the child. If the decision is to approve a proposed educational program, it should include a finding that a less restrictive program could not adequately and appropriately serve the child's educational needs.

A verbatim transcript of the proceedings at the hearing will be made, which will include all evidentiary materials and testimony by any of the parties. The record shall be made available to the parties to the hearing.

HOW DOES THE DUE PROCESS HEARING OFFICER INFORM THE PUBLIC AGENCY AND PARENTS OF HIS/HER DECISION?

The due process hearing officer sends his written decision by certified mail to the parents and the Public Agency. This must be completed within 45 days of the written request for the hearing.

IS THE DECISION OF THE IMPARTIAL DUE PROCESS HEARING OFFICER FINAL?

The decision of the hearing officer is binding upon the parents and upon the public agency, its officer, employees, and agents, subject to an impartial review of such hearing by the state education agency or judicial appeal.

HOW ARE WITNESSES COMPELLED?

The procedure for compelling witnesses is governed by state regulations. The DPHO does not have the authority to subpoena witnesses, however, the legal counsel for the party exercising this right may go through the district courts to subpoena a witness. If the party does not have legal counsel, they themselves can go through the district court to subpoena a witness.

WHAT IF THERE IS AN OBJECTION TO TESTIMONY IN THE HEARING?

The DPHO should make a note of the objection for the record, however, the testimony should continue (unless currently irrelevant or unduly addative) as the hearing is to provide a full opportunity to present all testimony and evidence that is relevant to the issue.

WHO HAS THE BURDEN OF PROOF IN A DUE PROCESS HEARING?

The burden of proof is upon the Public Agency. The Public Agency must prove that it has utilized appropriate identification, evaluation, placement, or educational procedures in relation to the unique needs of the child.

CAN THE DPHO REQUEST AN INDEPENDENT EVALUATION OF THE CHILD?

Yes, if the DPHO finds that he/she needs more information upon which to base his decision, he may request an independent evaluation of the child as a part of the hearing. If the DPHO requests the evaluation, the cost of the evaluation will be at public expense.

WHAT ARE THE RULES FOR SUBMITTING EVIDENCE?

The DPHO need not observe the rules of evidence observed by the courts. He is free to accept into the record any evidence that bears on the issue at hand, and shall allow witnesses to speak freely without interruption unless the testimony is unduly repetitious, irrelevant, or immaterial.

CAN THE DPHO REFER TO DOCUMENTS NOT INTRODUCED INTO EVIDENCE?

No, under basic administrative law, the DPHO may not refer to evidence not in the record of the hearing.

IF THE DPHO HAS AN EDUCATIONAL PHILOSOPHY, SHOULD HE UTILIZE THIS IN MARKING HIS DECISION?

No, the DPHO's decision cannot be based upon what he has taken as a "known" that is not supported by fact or evidence in the record of the hearing. Often, the DPHO will not ask a specific question during the hearing because the answer is already apparent to him. His decision

cannot be based upon that " already known answer" that is not in the record of the hearing.

It is important that the DPHO ask questions on points of clarification and not rely upon his educational philosophy.

WHAT IF BOTH PARTIES IN THE DUE PROCESS HEARING REACH A CONSENT AGREEMENT?

If the consent agreement is reached prior to the scheduled hearing, i.e. through a mediation process, the consent agreement should be written by the DPHO and maintained by him. The DPHO should notify all parties, i.e. witnesses, school personnel, that a consent agreement has been reached by both parties.

If a consent agreement is agreed upon during the course of the hearing, the DPHO writes the consent agreement as his written report and has both parties sign the agreement.

ROLE & RESPONSIBILITIES OF THE DUE PROCESS HEARING OFFICER

GENERAL ROLE OF THE DUE PROCESS HEARING OFFICER

A DPHO is:	A DPHO is not:
1. an impartial arbiter--	--a judge
2. a coordinator (responsible for arranging the Hearing and notifying all parties of major activities or events)	--a referral source (for lawyers, witnesses, etc.)
3. an information source (responsible for informing all parties of their rights before, during, and after the Hearing)	--an enforcer or interpreter of those rights
4. an uninvolved party--	--an employee of the school district or previously or currently involved with the child's care or educational program
5. a decision-maker--(responsible for making decisions based solely upon the evidence and testimony presented during the Hearing)	--a person who seeks information outside the Hearing which might influence his decision
6. a protector of confidentiality--(responsible for maintaining confidentiality of information prior to, outside and after the Hearing).	--a person who dicusses matters prior to, outside or after the Hearing which should only be discussed during the Hearing.

RESPONSIBILITIES OF THE DPHO

General Responsibilities:

1. To be trained and successfully complete the Due Process Hearing Officer training program, conducted and approved by the Utah State Office of Education.

2. To notify all parties of their rights before, during, and after the Due Process Hearing.

3. To notify all parties of the timelines which must be followed for:

   a. seeking an independent evaluation;
   b. directing school district or agency representatives to attend the Due Process Hearing;
   c. requesting representatives (including legal counsel) to attend the Due Process Hearing.

4. To notify all parties and representatives of:

   a. date, time, and location of Due Process Hearing.

5. To conduct the Due Process Hearing in a fair and impartial manner. (e.g., how to present evidence and testimony, examine, challenge, and cross-examine the testimony of witnesses).

6. To summarize the evidence and testimony of the case and to arrive at an impartial decision based solely on the evidence and testimony presented during the hearing and made a part of the record.

7. To notify all parties of the facts, findings, and decision regarding the hearing within 45 days of receipt of the written request for a Due Process hearing.

8. To be accountable for all deadlines and procedures in the laws and standards for due process:

   a. Utah's Amended Annual Program Plan states that upon receipt of the written request, the hearing officer will provide to the parents and to the officials of the public agency notification as to the time and place of the hearing, which shall be completed within 45 days of the request, and shall be a time and place reasonably convenient for the parents; and

   b. The decision of the Due Process Hearing Officer will be in writing and should be sent by certified mail within 45 days after the request for the Hearing to the parents, to the public agency, and to their respective representatives.

9. To maintain confidentiality of all information.

RESPONSIBILITIES OF THE PARENT AND PUBLIC AGENCY IN A DUE PROCESS HEARING

PARENT RESPONSIBILITIES

When parents have officially requested a due process hearing it shall be their responsibility to:

1. Attend the Hearing.

2. Provide to the DPHO a list of the evidence and witnesses that will be presented at the Hearing.

3. Provide to the public agency (five days prior to the Hearing) copies of written evidence that will be introduced into the record of the Hearing.

4. Comply with the decision made by the hearing officer. If an appeal is made, parents must comply with the decision until it is appealed and changed.

5. Continue to send their child to school in compliance with the compulsory attendance laws.

PUBLIC EDUCATIONAL AGENCY RESPONSIBILITIES

When the public education agency becomes involved in a Due Process Hearing or requests a hearing, it shall be their responsibility to:

1. Initiate a due process hearing upon written request of the parents, or initiate a due process hearing on their own behalf.
2. Provide the parents with a copy of their rights under procedural safeguards.
3. Appoint a Due Process Hearing Officer (DPHO).
4. Provide access to all educational records, reports and files regarding the child to the parents and those individuals designated by the parents at a reasonable cost.
5. Provide to the DPHO copies of those records.
6. Provide for the attendance of appropriate school personnel to give evidence and testimony at the Hearing on behalf of the public agency and when requested by the parents.
7. Assure the parents that the child's educational status will remain the same until after the DPHO has rendered his decision.
8. Provide for a surrogate parent where it is indicated.
9. Provide a meeting room for the Hearing.
10. Provide to the DPHO lists of the evidence and witnesses that will be presented at the Hearing.
11. Provide to the parents (5 days prior to the Hearing) copies of the written evidence that will be introduced into the record of the Hearing.
12. Provide, during the Hearing, an interpreter for the deaf, or interpreters fluent in the primary language of or used in the child's home.
13. Comply with the decision of the hearing officer. If the decision is appealed, the public agency must comply until it is appealed and changed.
14. Arrange for and pay the cost of a verbatim or electronic recording (written or electronic) of the Hearing to the parents upon their request.*
15. Reimburse the negotiated and approved expenses of the DPHO relative to the Hearing.

*Experience has shown that a written verbatim transcript is more cost effective and more useful than an electronic recording of the proceedings.

Section I

DIRECTIONS: For Questions 1 through 21, indicate whether the statement is true or false.

Answer	Questions	Reference in Manual
T F	1. An impartial due process hearing may be requested when the parent initially gives consent, but later revokes this consent.	Page 2
T F	2. Both the parents and the LEA chose the DPHO.	Page 14
T F	3. The Constitution of the U.S. directly provides for the right to an education for handicapped children.	Page 5
T F	4. The PARC case outlined a 23 step due process procedure to be utilized in making changes in the educational status of mentally retarded children.	Page 6
T F	5. Both the PARC and Mills cases established the "least restrictive environment" concept.	Pages 6 & 7
T F	6. The due process procedures are designed to protect against arbitrary decisions on the part of the school.	Page 7
T F	7. The mediation process is one way to delay a parent's right to a due process hearing.	Page 8
T F	8. A surrogate parent is not an employee of the SEA or public education agency involved in the education or treatment of the child.	Page 10
T F	9. The term "days" means calendar days.	Page 10
T F	10. The term "impartial due process hearing officer" means a person or tribunal of persons assigned to preside at a due process hearing.	Page 10
T F	11. A due process hearing officer does not have to complete a training program approved by the state.	Page 13
T F	12. A child over the age of 18 can request a hearing.	Page 14

Answer	Questions	Reference in Manual
T F	13. The request for a due process hearing should be made in writing to the state superintendent.	Page 15
T F	14. The DPHO initially notifies the parents in writing of their procedural rights in the hearing.	Page 15
T F	15. Only legal or professional persons are allowed to represent the participants during the hearing.	Page 16
T F	16. The decision of the DPHO is binding upon the parents and public education agency subject to an impartial review by the state education agency or judicial appeal.	Page 19
T F	17. The party requesting a due process hearing must prove his case.	Page 20
T F	18. The DPHO and the parents may request an independent evaluation.	Page 16 & 20
T F	19. The DPHO may refer to documents not introduced into evidence when making a decision.	Page 20
T F	20. The DPHO can rely upon his educational philosophy instead of asking points of clarification.	Pages 21 & 22

DIRECTIONS: For Questions 21-30, indicate the individual(s) responsible for each of the following activities (an individual may be used more than once). (a) DPHO, (b) public education agency, (c) Parents

Answer	Questions	Reference in Manual
_____	21. Notify all parties of the date, time, and location of the hearing.	Page 25
_____	22. Provide to the public education agency copies of evidence that will be introduced into the hearing.	Page 27
_____	23. Attend the hearing.	Page 27
_____	24. Provide appropriate school personnel for testimony at the hearing	Page 28
_____	25. Provide access to all educational records, reports, and files.	Page 28

Answer	Questions	Reference in Manual
_____	26. Comply with the hearing decision.	Pages 27 & 28
_____	27. Conduct the hearing in a fair and impartial manner.	Page 25
_____	28. Be accountable for all deadlines and procedures in the laws.	Page 25
_____	29. Notify all parties of their rights before, during, and after the hearing.	Page 25
_____	30. Be responsible for making a verbatim transcript of the hearing.	Page 28

II. PRE-HEARING

SECTION II

Goal

Upon completion of reading information on the pre-hearing activities of the Due Process Hearing Officer, the participant will be able to identify (by marking) or demonstrate (by listing) his/her knowledge on the pre-hearing activities by correctly answering specific questions on those activities with 80% accuracy.

Those questions will be taken from the following specific objectives for Section II:

1. Be able to identify (by marking) the information the DPHO should have following his/her initial contact with the education agency superintendent.
2. Be able to identify (by marking) the parties that the DPHO will be in contact with during the pre-hearing activities.
3. Be able to identify (by marking) what the DPHO does if another agency is providing the current education program for the child.
4. Be able to identify (by marking) the two types of activities that the DPHO will be involved in prior to the hearing.
5. Be able to identify (by marking) the procedures for making a verbatim transcript of the hearing.
6. Be able to identify (by marking) the procedures in selecting an interpreter when necessary.
7. Be able to identify (by marking) what is suggested to be included in the letter to the principal administrative officer of the public education agency at least five days prior to the hearing.
8. Be able to identify (by marking) what is suggested to be included in the formal letter to the principal administrative officer of the public education agency at least five days prior to the hearing.
9. Be able to identify (by marking) what information the DPHO should have following his/her initial contact with the parents.
10. Be able to identify (by marking) what is suggested to be included in the formal letter to the parents at least fifteen days prior to the hearing.
11. Be able to identify (by marking) what is suggested to be included in the formal letter to the parents at least five days prior to the hearing.
12. Be able to identify (by marking) how all formal correspondence is sent to the parents and education agency.
13. Be able to identify (by marking) how the DPHO contacts witnesses in a due process hearing.

14. Be able to identify (by marking) the parts of an agenda for the due process hearing.

15. Be able to identify (by marking) the areas that the DPHO needs to establish "ground rules" for conducting the hearing.

16. Be able to identify (by marking) who is responsible for paying the expenses incurred by the DPHO.

17. Be able to identify (by marking) how the DPHO receives a list of the representatives who will be testifying on behalf of the parents and the education agency.

1.0 SEQUENCE OF ACTIVITIES AND EVENTS: PRE-HEARING

FROM PRE-HEARING CHECKLIST ACTIVITY NUMBER:

HOW WILL YOU KNOW THAT YOU HAVE BEEN SELECTED AS THE DUE PROCESS HEARING OFFICER FOR A PARTICULAR CASE?

The superintendent (or his designee) will contact you. You will want to make sure that you have the following information as a result of this contact:

- ▶The written request for the Hearing; — 1.1

  Be sure to note the date of the request--you will have only 45 official work days following this date to complete the Hearing (unless there are significant extenuating circumstances) and render a decision.

- ▶A copy of the local school district's policy on hearing procedures; — 1.3

- ▶A determination of the need for an interpreter for the parents (either foreign language or deaf); — 1.4

- ▶The name and phone number of your Contact Person for payment, clerical assistance, supplies and facilities; — 1.2

  You will want to ask if this Contact Person is also the designee for other matters.

- ▶The name, address, phone number of the organization in your area responsible for your training as a Due Process Hearing Officer (DPHO). — 1.5

WHAT SHOULD YOU DO IMMEDIATELY AFTER YOU ARE CONTACTED TO BE A DUE PROCESS HEARING OFFICER?

- ▶Call to arrange your training - if you have already been trained, call the Utah State Office of Education to see if additional training is required. — 1.5

- ▶Call the Contact Person to arrange: — 1.6

  1. clerical assistance (the superintendent may choose to use school district personnel);

  2. honorarium and expences (e.g. travel);

FROM PRE-HEARING CHECKLIST ACTIVITY NUMBER:

3. reimbursement or supply of phone and mailing expenses;

4. facilities available for the Hearing.

▶ Complete your training or additional training. 1.7

Next, you will be involved in two types of activities--one is making arrangements for the Hearing to take place, the other is notifying all parties about the Hearing.

NOTE: During the time prior to the Hearing, you will be in contact with:

The Parent(s) (or guardian or surrogate);

The Superintendent (or his designee);

The Representatives (or witnesses) who are requested to appear at the Hearing.

These contacts have been grouped by person in the PRE-HEARING SEQUENCE OF ACTIVITIES AND EVENTS section. They are not in chronological order. Check the PRE-HEARING CHECKLIST for the chronological order (the Checklist Numbers in this section refer to the Pre-Hearing Checklist)

WHEN WILL YOU CONTACT THE SUPERINTENDENT?

Before the hearing, you will be contacting the superintendent (or his designee or Contact Person) in order to arrange for the hearing to take place and to provide notification regarding information, rights, and responsibilities of the school district before, during, and after the Hearing.

You must make at least two phone calls to the Superintendent to set up and confirm arrangements for

	FROM PRE-HEARING CHECKLIST ACTIVITY NUMBER:
the Hearing. You will need to:	
▶ Decide upon a date and time for the Hearing convenient to both the parents and the school.	1.10
▶ Find a place to hold the Hearing.	1.12
Request that a room be made available on the day of the Hearing.	
▶ Ask if another school district is providing the current educational program for the child.	1.11
NOTE: If a school (state, private, or public school district) -- other than the school district of residence -- is providing the child's current educational program, contact the administrator of that school to ask if they wish to be involved in the Hearing. If they wish to be involved, you must notify them about the Hearing. This school district should be placed on the Comprehensive List of Representatives for the Hearing and receive all communications.	
▶ Establish procedures to make a verbatim transcript of the Hearing.	1.12
Determine if a court reporter or a tape recorder will be used.	
If a tape recorder is to be used, ask--	
1) what type of recorder -- cassette or reel-to-reel;	
2) will you need batteries or an extension cord;	
3) when and where can you pick up and return the recorder;	
4) when and where can you pick up cassettes or tapes;	
5) who can demonstrate how to use the recorder.	
▶ If an interpreter is needed	1.12
NOTE: When parents are deaf or when the primary language spoken in the home is not English, arrangements must be made for an interpreter.	

	FROM PRE-HEARING CHECKLIST ACTIVITY NUMBER:
1) Call the Superintendent and request that a list of interpreters be sent to you. 2) Choose and establish contact with the interpreter. 3) Develop the following: a. a list of dates and times when the interpreter will be needed b. for non-English-speaking parents, develop procedures for all correspondence to be interpreted in the native language of the parents.	
▶ Establish that the school has informed the parents of their rights.	1.9
To notify the Superintendent about the Hearing, you must write two letters and make one phone call.	
▶ At least 15 official work days prior to the Hearing, send a formal notice to the superintendent--by Certified Mail, Return Receipt Requested-which indicates the following: 1. the time, date and location for the Hearing; 2. a reminder that parents must be given full access to their child's record before the Hearing; 3. a date (7-9 official work days prior to the Hearing is suggested) when you will call for a list of the documents that will be introduced into evidence and a list of representatives requested to appear by the school district at the Hearing including: name mailing address phone number (area code) title/relationship to child reason for attending order of appearance;	1.13

FROM PRE-HEARING CHECKLIST ACTIVITY NUMBER:

4. a summary of the main points discussed during your previous phone conversation with the superintendent.

▶ Phone the superintendent (or his designee) to request the school district's list of representatives who will testify at the Hearing and ask if legal counsel will be representing the district. — 1.15

▶ At least 5 official work days prior to the Hearing, send a formal letter to the superintendent--by Certified Mail, Return Receipt Requested--which includes the following: — 1.18

1. the comprehensive list of all participants (representatives, etc.) in the Hearing including names and titles (or relationships to child);
2. an agenda for the hearing (including a schedule for the appearance of witnesses);
3. a list of the documents that will be introduced into evidence by all parties;
4. a list of procedures to be followed during the Hearing.

WHEN WILL YOU CONTACT THE PARENTS:

You will have four contacts with the parents (or guardian or surrogate) prior to the Hearing.

▶ During an initial phone call or visitation, ask the parents for the following information (see Visitation or Telephone/Checklist, "Parents-Initial DPHO"): — 1.8

1. is an interpreter (foreign language or deaf) needed;
2. will parents seek an Independent Evaluation;
3. what dates and times are convenient for parents to attend the Hearing.

	FROM PRE-HEARING CHECKLIST ACTIVITY NUMBER:
▶At least 15 official work days prior to the Hearing, you must send a formal notice to the parents--by Certified Mail, Return Receipt Requested--including the following:	1.14
1. date, time and location of the Hearing;	
2. a date when you will call for a list of any representatives (including school district or agency personnel) who must be contacted to appear at the Hearing. (ask for names, addresses, phone numbers, relationship to child and case, and, if possible, titles); also ask that a list of the documents that will be introduced into evidence to be sent to you as soon as possible;	
3. a statement as to whether the parents have requested an open or closed hearing	
4. a statement as to whether or not parents wish to have the child present during all or part of the hearing;	
5. a statement of parents' rights before, during, and after the hearing.	
6. a summary of the main points discussed during your initial conversation with the parents.	
▶Phone or visit the parents and ask the following:	1.16
1. the list of representatives they wish to appear at the Hearing--complete form "Parents Representatives for Impartial Due Process Hearing";	
2. if the parents are going to be represented by legal counsel at the hearing;	
3. their wishes concerning the attendance of their child at the Hearing;	
4. whether they still wish the Hearing to be open or closed.	
▶At least 5 official work days prior to the Hearing, send a formal notice to the parents--by Certified Mail, Return Receipt Requested--which includes the following:	1.19

FROM PRE-HEARING CHECKLIST ACTIVITY NUMBER:

1. the comprehensive list of all participants (representatives, etc.) in the Hearing including names and titles (or relationships to child);

2. an agenda for the hearing (including a schedule for the appearance of witnesses);

3. a list of procedures to be followed during the hearing;

4. a list of the documents that will be introduced into evidence by all parties;

5. a list of parents' rights during the Hearing.

WILL YOU BE IN CONTACT WITH ANYONE ELSE?

Yes, the Due Process Hearing Officer is responsible for notifying all representatives (witnesses) who will be asked to attend the Hearing.

At least 5 official working days prior to the Hearing, send a formal notice to all representatives--by Certified Mail, Return Receipt Requested which included the following: 1.20

1. the comprehensive list of all participants (representatives, witnesses, etc.) in the Hearing including names and titles (or relationship to child);

2. an agenda and hearing procedures (including a schedule for the appearance of witnesses).

WHAT ELSE MUST YOU DO BEFORE THE HEARING?

You must decide on a date, time, and location for the Hearing. This should be as convenient as possible

FROM PRE-HEARING CHECKLIST ACTIVITY NUMBER:

for all parties. In order to fully notify all parties about the Hearing, you must develop:

1. a comprehensive list of participants (representatives, witnesses) for the Hearing, see Checklist Numbers 1.13 and 1.14;

2. an agenda for the Hearing, see "Developing an Agenda for the Hearing";

3. a set of procedures to be followed during the Hearing, see "Guidelines for Developing Hearing Procedures".

DEVELOPING AN AGENDA FOR THE HEARING

To begin, you will need . . . . .

The lists of representatives requested to appear for the Petitioner and the Respondent (including the order in which they were requested to appear), this order may change at the Hearing, depending upon the discretion of the Petitioner and or the Respondents' request.

Next . . . . .

Decide on an order in which the Due Process Hearing Officer (DPHO), the Petitioner and the Respondent will be given the opportunity to examine, challenge and cross-examine witnesses

Determine the approximate amount of time it should take for:

1) Opening Statements
2) Witnesses' Testimony
3) Questioning Witnesses
4) Summary and Closing Statements

Then . . . . .

Write the major subdivision headings for the Hearing and list witnesses' names in the requested order for appearance

e.g.

I. Opening Statements . . . . . (DPHO, name)
(Petitioner, name)
(Respondent, name)

II. Presentation of Testimony and Evidence for the--Petitioner *

1) Jack Jones
2) John Smith

III. Presentation of Testimony and Evidence for the--Respondent *

1) Susan James

* An opportunity will be provided for the DPHO, the Petitioner and the Respondent to question, challenge, and cross-examine the testimony of each witness.

IV. Summary Statements . . . . . Petitioner
Respondent

V. Closing Statement . . . . . DPHO

Finally . . . . .

1) Add identifying information for the Hearing

e.g. Impartial Due Process Hearing

DPHO: _____ On Behalf of: _____
Superintendent of Schools: __ Petitioner: _____
_____ Respondent: _____
School District: _____
County: _____

Reason for Hearing: _____

Date: _____

2) Write the time when:

   a. the Hearing begins
   b. witnesses will begin testimony (be sure to note that these are approximate times)

3) Add times for breaks (15 minutes in A.M. and P.M. is usual) and for lunch (1 hour is usual).

GUIDELINES FOR DEVELOPING HEARING PROCEDURES

Part of your role as a DPHO involves conducting the Hearing in an orderly manner. This means that you need to establish some "ground rules":

1. calling and excusing witnesses;
2. the presentation of testimony;
3. the presentation of evidence;
4. an opportunity for questioning of all witnesses;
5. entering statements/evidence into the record;
6. dealing with the recording of the Hearing.

Why? So that all participants in the Hearing have a full opportunity to present their testimony and evidence and to cross-examine or challenge others' testimony and evidence. Ultimately, this will aid you in making a fair and impartial decision based on sufficient information from both sides.

There are two things that you must remember when developing these procedures:

1. the Hearing should be as formal as possible . . . the procedures should provide the necessary structure and direction.
2. you are "running the show" . . . it's up to you to keep the Hearing running smoothly--remember, this is a quasi legal proceeding.

You will want to list some basic procedures under each of the areas mentioned above. Your list should be approximately (no longer than) a page in length.

DPHO PRE-HEARING CHECKLIST

WRITTEN REQUEST FOR HEARING

Initiated by (name): _____ Superintendent (or Designee): _____

(Relationship to child): _____

On behalf of (child's name): _____ Impartial Hearing Officer: _____

Date of request: _____

CHECK-LIST	ACTIVITY, EVENT OR PROCEDURE	CONTACTS	INFORMATION RECEIVED	TIMELINE	ACTUAL DATE COMPLETED
1.1	Receive written request for Hearing	Superintendent (or Designee) phones DPHO	Date of Request: ___ _____		
1.2	Receive name of Contact person		Contact Person: ___ _____ Phone: _____		
1.3	Receive copy of public agency's policy on Hearing procedures		Person Requested from: _____ _____		
1.4	Determine need for Interpreter (Deaf or Foreign Language)		Interpreter needed? Yes No Type _____		
1.5	Receive name to call for DPHO training		Training: _____ Phone: _____		

CHECK-LIST	ACTIVITY, EVENT OR PROCEDURE	CONTACTS	INFORMATION RECEIVED	TIMELINE	ACTUAL DATE COMPLETED
1.6	Call Contact Person: Arrange clerical assistance, honorarium, reimbursement, facilities available	DPHO phones Contact Person	Clerical: _____ Phone: _____		
1.7	Complete DPHO Training	DPHO completes training program	Date for training: _____ Time: _____		
1.8	Call or visit Parents (Initial Contact): -Plans for Independent Evaluation -Convenient date for Hearing -Review Parents' Rights -Is an interpreter needed	DPHO phones or visits parents	Spoke with: _____ Planning Independent Evaluation? Yes No Convenient Dates & times for Hearing: _____		
1.9	Call or Visit School Contact Person	DPHO phones or visits school	Spoke with: _____ informed parents of their rights? Yes No Convenient dates & times for Hearing: _____		

CHECK-LIST	ACTIVITY, EVENT OR PROCEDURE	CONTACTS	INFORMATION RECEIVED	TIMELINE	ACTUAL DATE COMPLETED
1.10	Decide on date and time for Hearing (convenient for parents if possible)	(DPHO decision based on convenience, availability of room)	Hearing Date: _____ Time: _____		
1.11	(When appropriate) Call school providing current educational program -ask if they wish to be involved -place on Comprehensive Representative List (for notification purposes)	DPHO calls school offering current program	School District offering current program: _____ _____ _____ Contact: _____ _____		
1.12	Arrange facilities and equipment for Hearing -Find place to hold Hearing -Establish procedures for recording -Establish procedures for interpreter (if necessary)		Location for Hearing _____ _____ Address: _____ _____ Procedures for Recording: _____ _____ (Interpreter) Dates Needed: _____		

CHECK-LIST	ACTIVITY, EVENT OR PROCEDURE	CONTACTS	INFORMATION RECEIVED	TIMELINE	ACTUAL DATE COMPLETED
1.12	(cont'd.)		(Interpreter) Times Needed: _____ Name: _____ Phone: _____		
1.13	Send notice to Superintendent: -Time, date, location of Hearing -Reminder of Parents right to access records -Date when DPHO will call for list of School District Representatives (Witnesses) and a list of documents that will be introduced into evidence -Summarize previous conversation(s)	DPHO writes to Superintendent (or Designee); Sends by Certified Mail, Return Receipt Requested	Date DPHO will call for Representative list and list of documentary evidence: _____	15 official work days prior to Hearing	

CHECK-LIST	ACTIVITY, EVENT OR PROCEDURE	CONTACTS	INFORMATION RECEIVED	TIMELINE	ACTUAL DATE COMPLETED
1.14	Send notice to Parents: -Time, date and location of Hearing -Statement (or brochure) of parent's Rights -Date DPHO will call regarding (a) List of Parent's Representatives (witnesses) for Hearing and a list of the documents that will be introduced into evidence (b) Parent's wishes for Child's Attendance during the Hearing (c) Open or closed Hearing -Summarize initial conversation	DPHO writes to Parents; Sends by Certified Mail, Return Receipt Requested	Date DPHO will call for Representative list and list of documentary evidence: _____	15 official work days prior to Hearing	
1.15	Call Superintendent: -List of School District Representatives -Confirm if legal counsel will represent school -Confirm Hearing arrangements	DPHO phones Superintendent			

CHECK-LIST	ACTIVITY, EVENT OR PROCEDURE	CONTACTS	INFORMATION RECEIVED	TIMELINE	ACTUAL DATE COMPLETED
1.16	Call Parents: -List of Representatives -Confirm if legal counsel will represent parents -Child's attendance at Hearing -Open or Closed Hearing	DPHO phones Parents	(Attach Representatives list) -Parents wish child to attend Hearing? Yes No -Open or Closed Hearing? _____		
1.17	Develop agenda and Hearing procedures including: -Comprehensive list or Representatives and scheduled time to appear -Rules for presenting testimony	Prepared by DPHO			
1.18	Send notice to Superintendent: -Agenda and Hearing procedures -Comprehensive list of Representatives scheduled to appear -Comprehensive list of evidence that will be introduced	DPHO writes to Superintendent; sends by Certified Mail, Return Receipt Requested		Five (5) official work days prior to Hearing	

CHECK-LIST	ACTIVITY, EVENT OR PROCEDURE	CONTACTS	INFORMATION RECEIVED	TIMELINE	ACTUAL DATE COMPLETED
1.19	Send notice to Parents: -Agenda and Hearing procedures -Comprehensive list of Representatives scheduled to appear -Comprehensive list of evidence that will be introduced	DPHO writes to parents; sends by Certified Mail, Return Receipt Requested		Five (5) official work days prior to Hearing	
1.20	Send notice to all Representatives: -Agenda and Hearing procedures -Comprehensive List of Representatives	DPHO writes to all Representatives (witnesses) on Comprehensive List; send by Certified Mail, Return Receipt Requested		Five (5) official work days prior to Hearing	
1.21	Check all Hearing arrangements for last minute details to complete		Any arrangements to complete? List:		

PRE-HEARING: SUGGESTED FORMS AND LETTERS

FROM CHECKLIST ACTIVITY NO.	TO:	DESCRIPTION
1.8	Parents	Initial DPHO Contact (Visitation -- Telephone Checklist)
1.9	Public Agency Superintendent or Designee	Initial DPHO Contact (Visitation -- Telephone Checklist)
1.13	Public Agency Superintendent or Designee	Pre-Hearing Information Telephone follow up and notification of date and location for Hearing
1.14	Parents	Pre-Hearing Information Telephone follow up and notifiaction of date and location for Hearing
1.14	Parents	Information on witnesses (attach to letter 1.14)
1.13	Public Agency	Information on witnesses (attach to letter 1.13)
1.15	Public Agency	List of Representatives and Documents
1.16	Parents	List of Representatives and Documents
1.17	Parents and Public Agency	Sample Agenda
1.18	Public Agency Superintendent or Designee	Agenda, List of Documents, and Representatives
1.19	Parents	Agenda, List of Documents and Representatives
1.20	Parent and Public Agency Representative	Information on the date and location of the Hearing

Sample from Checklist No. 1.8

VISITATION - TELEPHONE CHECKLIST

PRE-HEARING INFORMATION (TO PARENT)

Complete before calling

Child's Name: _____

Parents' (Guardian or Surrogate) Name: _____

Phone Number: _____

School District: _____

School Representative: _____

Phone Number: _____

Date of Written Request for Hearing: _____

Reason for Request: _____

NOTE: You may not discuss any matters relating to the facts of the case. You are calling to make arrangements only. The parent may wish to discuss the case. If this happens, you must tell them that you cannot, under any circumstances, discuss any information about the case.

Complete during the call, check off items as they are discussed

Date:
Spoke with:

1. Introduce yourself — e.g. This is _____. I have been appointed as the Hearing Officer in the matter concerning _____ (name of child) _____.

2. Explain reason for call — e.g. I am calling for two reasons. First, I would like to determine if you have been fully informed of your rights. Second, I would like to ask you a few questions in order to obtain the necessary information I will need to make arrangements for the hearing. Do you have a few minutes to answer my questions?

(IF NOT, ESTABLISH ANOTHER TIME TO CALL.)

3. Explain parent's rights

e.g. First of all, I would like to determine if you have been informed of your rights. Please answer yes or no to the following questions.

a. Have you had access to all educational records for your child?
Yes _____ No _____

b. Have you had an opportunity to obtain copies of those records at the actual cost of reproduction?
Yes _____ No _____

c. Have you named, in writing, others who may have similar access (e.g. lawyer, independent evaluator)?
Yes _____ No _____

d. Have you been informed that you may request the attendance at the Hearing any school personnel who may have information relevant to your child?
Yes _____ No _____

e. That you may bring representatives, including legal counsel, to the hearing?
Yes _____ No _____

f. Have access to any evidence that will be introduced into the hearing at least 5 days prior to the hearing?
Yes _____ No _____

NOTE: If you receive a no answer to any of these questions, you should explain to the parent that they have that right according to law.

4. Ask the following questions

a. Is English the primary language spoken in your home? Check One:
Yes _____ No _____

b. Do you plan to have or have you had an independent educational evaluation?
Yes _____ No _____

If parents are not sure what an independent evaluation is, explain the following:

1. a series of tests or an assessment
2. conducted by qualified professional outside the school
3. at the parents' expense
4. it may be used during the hearing

c. What written evidence do you plan to introduce?

Remind the parents that any evidence they plan to introduce must be disclosed at least five days prior to the hearing.

d. Do you plan to be represented by legal counsel?
Yes _____ No _____
If yes, name of counsel
_____

e. What witnesses do you plan to have testify?
_____

f. Do you wish to have the hearing open or closed? Check one:
Open _____ Closed _____

g. What would be the most convenient date and time for the hearing?

	FIRST CHOICE	SECOND CHOICE	THIRD CHOICE
DATES:			
TIMES:			
DAYS:			

h. Does the _____(location)_____ create any problems for you as a location for the hearing?
Yes _____ No _____

5. Summarize the Conversation and explain that they may expect a letter from you soon.

e.g. I understand that you will be obtaining an Independent Evaluation and that it will be completed by (date). The date and times which are best for you for the hearing are (date and time). I will be sending you a letter soon which tells the exact date, time, and location for the Hearing.

Sample from Checklist No. 1.9

VISITATION - TELEPHONE CHECKLIST

PRE-HEARING INFORMATION (TO PUBLIC AGENCY)

Complete before calling:

Child's Name: _____

Parents' (Guardian or Surrogate) Name: _____

Phone Number: _____

School District: _____
(Public Education AGENCY)

School Representative: _____
(AGENCY)

Phone Number: _____

Date of Written Request for Hearing: _____

Reason for Request: _____

NOTE: You may not discuss any matters relating to the facts of the case. You are calling to make arrangements only. The school representative may wish to discuss the case. If this happens, you must tell them that you cannot under any circumstances, discuss any information about the case.

Complete during the call, check off items as they are discussed.

Date:
Spoke with:

1. Introduce yourself — e.g. This is _____. I have been appointed as the Hearing Officer in the matter concerning _____ (name of child) _____.

2. Explain reason for call — e.g. I am calling for two reasons. First, I want to confirm that you have fulfilled your due process requirements in this matter. Second, I would like to ask a few questions in order to obtain the information I need to make the arrangements for the hearing. Do you have a few minutes now to answer my questions?

(IF NOT, ESTABLISH ANOTHER TIME TO CALL.)

3. Ask the following questions

a. Have you informed the parents of their rights?
Yes _____ No _____

b. Do you know your rights?
Yes _____ No _____

If no, refer them to the Amended Annual Program Plan for FY 1978 under Public Law 94-142, Part B.

c. Do you plan to be represented by legal counsel?
Yes _____ No _____

If yes, name of counsel
_____

d. What witnesses do you plan to introduce?
_____

e. What written evidence do you plan to introduce?
_____

Remind the agency that any evidence to be introduced must be disclosed at least five days prior to the hearing

f. Do you have a conference room large enough for the hearing? (Adjust for number of expected participants)
Yes _____ No _____

If no, do you have any recommendations for a location for the hearing?

g. What would be the most convenient date and time for the hearing?

	FIRST CHOICE	SECOND CHOICE	THIRD CHOICE
DATES:			
TIMES:			
DAYS:			

Cross check with dates and times obtained from the parents.

4. Summarize the conversation and explain that he/she may expect a letter from you soon which tells the exact date, time, and location of the hearing.

Sample from Checklist No. 1.13

Sample Followup Letter: Prehearing Information
(SCHOOL DISTRICT)

This letter will serve to summarize our phone conversation of (date) regarding the arrangements for the hearing on the matter of (child's name). As I stated during our conversation, the purpose of our discussion was to obtain information necessary for the hearing.

We discussed the introduction of written evidence and the presentation of witnesses and agreed that written evidence and the attached list of witnesses must be forwarded to me in time for full disclosure to the parents within the mandatory five-day time limit.

In addition, we agreed that, since English is the primary language of the home, there will be no need for an interpreter or translator. Also, the parents request that the hearing be (open/closed).

Finally, we agreed to hold the hearing at (location) on (date) at (time).

The parents have also agreed to this time and place. I will send a formal notice to you and your witnesses regarding the time and place of the hearing as soon as I receive your list of witnesses.

Thank you for your cooperation. If you need to contact me in reference to the proceedings, you may do so at (phone number) from (hours) to _____ on any weekday. Once again, I will not be able to discuss the facts of this case with you, only the procedural matters relating to the arrangements for the hearing.

Sincerely,

_____

Sample from Checklist No. 1.14

Sample Followup Letter: Prehearing Information (PARENT)

Dear _____:

This letter will serve to summarize our phone conversation of (date) regarding the arrangements for the hearing on the matter of (child's name). As I stated at the beginning of our conversation, the purpose of our discussion was two-fold: 1) to determine if the (public agency) has fully complied with the due process requirements, and 2) to obtain information necessary to plan for the hearing.

After discussing the due process provisions on a point-by-point basis, I am satisfied that the school district has adequately informed you of your rights. In addition, we discussed the introduction of written evidence, the presentation of witnesses, and your plans for an independent educational evaluation.

Let me remind you again that any written information you plan to introduce must be forwarded to me in time for full disclosure to the public agency within the mandatory five-day time limit. Also, please complete the attached form listing the witnesses you intend to present.

In addition, we agreed that, since English is the primary language of the home, there will be no need for an interpreter or translator. Also, as we agreed, the hearing will be (open/closed).

Finally, we agreed to hold the hearing at (location) on (date) at (time). The school district has agreed to this time and place. I will send a formal notice to you and your witnesses regarding the time and place of the hearing as soon as I receive your list of witnesses.

Thank you for your cooperation. If you need to contact me in reference to the proceedings, you may do so at (phone number) from (hours) to _____ on any weekday. Once again, I will not be able to discuss the facts of this case with you, only the procedural matters relating to the arrangements for the hearing.

Sincerely,

_____

Attachment to 1.13 & 1.14

Information on Witnesses Re: _____
(Name of Child)

Please complete the following information so that notice may be provided to the witnesses relating to the time and place of the hearing.

---

1. Voluntary Witnesses:

	NAME	POSITION	ADDRESS
a)			
b)			
c)			
d)			
e)			

2. Witnesses to be compelled. (Note: In accord with Section 300.508, any party to a hearing has the right to compel the attendance of witnesses. This section should be used to list the name of witnesses who are not attending on a voluntary basis.)

	NAME	POSITION	ADDRESS
a)	_____	_____	_____
	Reason for requiring attendance:		
b)	_____	_____	_____
	Reason for requiring attendance:		

Sample from Checklist No. 1.15

TELEPHONE CHECKLIST

PRE-HEARING INFORMATION - PUBLIC AGENCY'S
LIST OF REPRESENTATIVES AND DOCUMENTS

Complete before calling

Child's Name: _____

Parents' (Guardian or Surrogate) Name: _____

Superintendent's Name: _____

School District: _____

Phone Number: ( ) _____

Date of Written Request for Hearing: _____

Reason for Request: _____

Complete during conversation.

Date:
Spoke with:

1. Identify yourself — e.g. This is _____.

2. Explain reason for call — e.g. First, I am calling as arranged to establish that I have a complete list of the representatives that you wish to call at the hearing and second, that I have a complete list list of the documents that will be introduced into evidence.

3. First, I would like to confirm the list of your representatives and the order in which you wish to have them called. Please correct me if the list is incorrect.

READ LIST OF REPRESENTATIVES IN THE ORDER SUMITTED

a. Is this list complete?
Yes _____ No _____

If no, who are you adding or deleting?

_____

4. Next, I would like to confirm with you the documents that will be introduced into evidence. Please correct me if the list is incorrect.

READ LIST OF DOCUMENTS

a. Is this list complete?
Yes _____ No _____

If no, what documents do you wish to add or delete?

_____

b. Have the parents had access to these documents?
Yes _____ No _____

If no, remind the agency that parents have a right of access to all documents that will be introduced into evidence five days prior to the hearing date.

5. Remind the Agency of the Hearing date

e.g. At the hearing on _____(date)_____, I will be calling your witnesses in the order we agreed upon today.

Sample from Checklist No. 1.16

TELEPHONE CHECKLIST

PRE-HEARING INFORMATION - PARENTS' LIST OF REPRESENTATIVES AND DOCUMENTS

Complete before calling

Child's Name: _____

Parents' (Guardian or Surrogate) Name: _____

Superintendent's Name: _____

School District: _____

Phone Number: ( ) _____

Date of Written Request for Hearing: _____

Reason for Request: _____

Complete during conversation.

Date Contacted: _____
Spoke With: _____

1. Identify yourself — e.g. This is _____.

2. Explain Reason for call — e.g. I am calling as arranged to establish that I have a complete list of the representatives that you wish to call at the hearing and also that I have a complete list of the documents that will be introduced into evidence.

3. First, I would like to confirm with you the list of your representatives and the order in which you wish to have them called. Please correct me if the list is incorrect.

READ LIST OF REPRESENTATIVES IN THE ORDER SUBMITTED

a. Is this list complete?
Yes _____ No _____

If no, who do you wish to add or delete?

_____

4. Next, I would like to confirm with you the documents that will be introduced into evidence. Please correct me if the list is incorrect.

READ LIST OF DOCUMENTS

a. Is this list complete?
Yes _____ No _____

If no, what documents do you wish to add or delete?

_____

b. Has the agency had access to these documents?
Yes _____ No _____

If no, remind the parents that the agency has a right of access to all documents that will be introduced into evidence five days prior to the hearing date.

5. Remind the Parents of the Hearing Date

e.g. At the Hearing on (date), at (location), I will be calling your representatives in the order agreed upon today.

Sample from Checklist No. 1.17

SAMPLE AGENDA

9:00 a.m. Thursday, March 30, 1981

Conference Room of Anywhere School
747 Mountain View Drive
Anywhere, Utah

I. Formal Call to Order

II. Introductory Remarks

A. Introduction of Hearing including Purpose and Procedures

B. Introduction of Hearing Officer

C. Introduction of Participants for Record

D. Establish Compliance with Parental Rights for the Record

E. Statement of Open or Closed Hearing

III. Opening of Formal Testimony

A. Format

B. Opening Statement

1. Petitioner

2. Respondent

C. Presentation of Written Evidence and Testimony

1. Testimony of Witnesses and Evidence

a) Petitioner

b) Respondent

IV. Summary Statements

A. Petitioner

B. Respondent

V. Closing Statements by Hearing Officer

A. Decision Date

B. Availability of Verbatim Record of Hearing

C. Procedures for Appeal

Sample from Checklist No. 1.18

Date:

Dear (Superintendent or Designee):

The agenda for the Impartial Due Process Hearing of (child's name) to be held on (date) beginning at (time) is enclosed for your review. Included with the agenda is a list of procedures which will be followed during the hearing. Please read these carefully before the hearing.

Also enclosed for your information, is a list of all representatives participating in the hearing and a list of the documents that will be introduced into evidence. I would like to remind you that if you have not had disclosure to any of these documents, you may challenge their introduction into evidence in the hearing record.

If you have any questions regarding the agenda, list of witnesses, or documents, please contact me at (phone number) from (hours) to _____ on any weekday. I will not be able to discuss the facts of this case with you, only the procedural matters related to the activities of the hearing.

Sincerely,

_____

Due Process Hearing Officer

DPHO/ps

Enclosures: Agenda
List of Representatives
List of Documents

Sample from Checklist No. 1.19

Date:

Dear (Parents):

Please find the agenda that is enclosed for the Impartial Due Process Hearing on behalf of (child's name). This will give you an idea about the order in which testimony will be presented. At the hearing you or your legal representative will have the opportunity to:

present evidence (documents)
call witnesses to present testimony
and/or evidence
challenge, examine, and cross-examine witnesses

A list of representatives who will participate in the hearing is included for your information and reference. In addition, enclosed is a list of the documents that will be introduced into the hearing. I would like to remind you that if you have not had disclosure to any of these documents you may challenge their introduction into evidence in the hearing record.

If you have any questions regarding the agenda, list of witnesses, or documents, please call me at (phone number) from (hours) to _____ on any weekday. I will not be able to discuss the facts of this case with you, only the procedural matters related to the activities of the hearing.

Sincerely,

_____

Due Process Hearing Officer

DPHO/ps

Enclosures: Agenda
List of Representatives
List of Documents

Sample from Checklist No. 1.20

Date:

Dear (Parent or School Representative):

You are requested to appear at the Impartial Due Process Hearing on behalf of (child's name) at the request of (Parent or School District). The Hearing will be conducted at (building name, room no., address) beginning at (time) on (date).

For your reference, an Agenda for the Hearing has been enclosed. Please note the time when you are scheduled to appear. Although it is difficult to predict exactly how long you will be required to stay, you may plan on at least (specify time period).

A list of the general procedures which will be followed during the Hearing is also enclosed. Please review these before the Hearing. A comprehensive list of representatives who will appear at the Hearing has been enclosed for your information.

Please call or write before (date) to confirm your participation in the Hearing.

Sincerely,

_____

Due Process Hearing Officer
(phone number and address)

Enclosures: Agenda
Hearing Procedures
Comprehensive List of Representatives

ADDITIONAL TELEPHONE LOG

NOTE: In some instances you may have further telephone contact than those suggested in the Pre-Hearing Activities. This sample telephone log may be utilized to maintain a record of those calls.

DATE	PERSON TALKED TO	SUMMARY OF CALL

Section II

DIRECTIONS: For Questions 1-7, match the activity or procedure with their corresponding timelines. (Timelines may be used more than once) Timeline: a. at least 15 offical work days prior to the hearing; b. at least 5 official work days prior to the hearing; c. 30 official work days; d. 45 official work days.

Answer	Activity or Procedure	Reference in Manual
_____	1. notice of the hearing sent to the superintendent (time, date, etc.)	Page 33
_____	2. notice of the hearing sent to the parents (time, date, etc.)	Page 35
_____	3. Agenda, Hearing Procedures, and Comprehensive List of participants sent to parents	Pages 35 & 36
_____	4. Agenda, Hearing Procedures, and Comprehensive List of participants sent to superintendent	Page 34
_____	5. Agenda, Hearing Procedures, Comprehensive List of representatives sent to all participants	Page 36
_____	6. Length of time between date of the written request for the hearing is received and actual hearing is conducted	Page 30

DIRECTIONS: For Questions 8-11, indicate the individual responsible for completing or arranging the following activities (individual may be indicated more than once). Individual responsible: a. DPHO, b. LEA, c. Parents.

Answer	Activity or Procedure	Reference in Manual
_____	8. Arrangements for conducting the hearing	Pages 31 & 32
_____	9. Working with DPHO to locate facilities and arrange for the recording of the hearing	Page 32
_____	10. Notifying all participants of the hearing	Page 31
_____	11. Seeking an independent evaluation of the child	Page 34

DIRECTIONS: For Questions 12-17, indicate whether the statement is true or false.

Answer	Questions	Reference in Manual
T F	12. If another school district, other than the school district of the child's residence, is providing the current educational plan, the DPHO does not have to notify them of the hearing.	Page 32
T F	13. The DPHO should call the LEA and the parents 7-9 official work days prior to the hearing to get a list of the witnesses and the documents that will be introduced into evidence.	Pages 33 & 35
T F	14. The DPHO will usually have at least four contacts with the parents and the LEA prior to the hearing.	Pages 33 & 34
T F	15. The DPHO sends all written correspondence to the parents and the LEA by certified mail.	Pages 33, 34, 35, 36
T F	16. The DPHO should establish "ground rules" for conducting the hearing in an orderly manner.	Page 40
T F	17. The agenda for the hearing should include a formal call to order.	Page 61

III. CONDUCTING THE HEARING

SECTION III

Goal

Upon completion of reading materials on conducting the hearing, the participant will be able to correctly answer questions on the hearing activities with 80% accuracy.

These questions will be taken from the following specific objectives for Section III:

1. Be able to identify (by marking) the major components of the DPHO's opening statement.
2. Be able to identify (by marking) the major components of the DPHO's closing statement.
3. Be able to identify (by marking) why an DPHO may call a pre-hearing conference with the legal representatives of the petitioner and respondent.
4. Be able to identify (by marking) how the DPHO begins the hearing.
5. Be able to identify (by marking) the procedures for the opening statements of the parents and the education agency.
6. Be able to identify (by marking) the procedures for an open or closed hearing.
7. Be able to identify (by marking) the procedures for presenting evidence and testimony.
8. Be able to list the procedures for marking documentary evidence.
9. Be able to identify (by marking) when the DPHO asks for clarification of testimony, terminology, or evidence.
10. Be able to identify (by marking) when the parent or education agency may enter a statement or evidence into the transcript of the record.
11. Be able to identify (by marking) how the DPHO calls witnesses.
12. Be able to identify (by marking) the procedures that the DPHO must follow each time a new witness is called.
13. Be able to identify (by marking) when summary statements are given during the hearing.
14. Be able to identify (by marking) what the DPHO should do if the audience becomes disruptive during an open hearing.
15. Be able to identify (by marking) what the DPHO should do if the hearing becomes very emotional.

16. Be able to identify (by marking) what the DPHO should do if a witnesses' testimony becomes repetitive or too lengthy.

17. Be able to identify (by marking) what the DPHO should do if the parents have not been given access to their child's records.

18. Be able to identify (by marking) what the DPHO should do if the parents' rights have been denied.

CONDUCTING THE HEARING

In order to assure that the hearing will proceed smoothly, according to the agenda, and following the Hearing Procedures which you have developed, you will want to:

1. Develop an outline of your Opening and Closing Statements including:

OPENING STATEMENT (See Appendix B for a sample opening statement):

a. Identification of the Hearing;

b. An overview of what a Hearing is; and

c. Review of Hearing Procedures (e.g., rules for presenting evidence, witnesses, etc.).

CLOSING STATEMENT (See Appendix C for a sample closing statement):

a. Overview of Due Process and Procedural Safeguards; and

- How this Hearing relates to the process.

- Appeal Procedures - which outlines rights and procedures for either party to appeal the decision.

b. Outline what will happen next.

- Both sides will receive a written report of the facts and findings of the Hearing including the decision of the Due Process Hearing Officer (DPHO) within 45 official work days from the date the hearing was requested.
- Parents may request a written or verbatim recording of the Hearing.

2. Be prepared to take notes during the Hearing.

- Have a sheet ready to list evidence.

- Have a sheet ready to list witnesses.

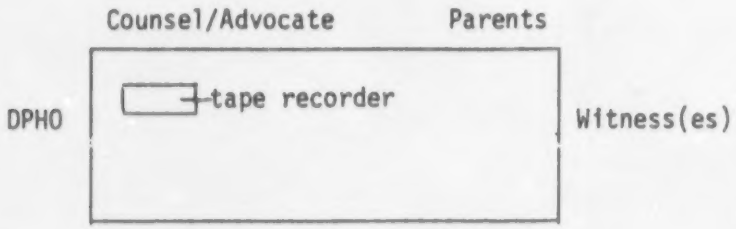
3. Have a copy of the affirmation oath that will be used to swear in witnesses.

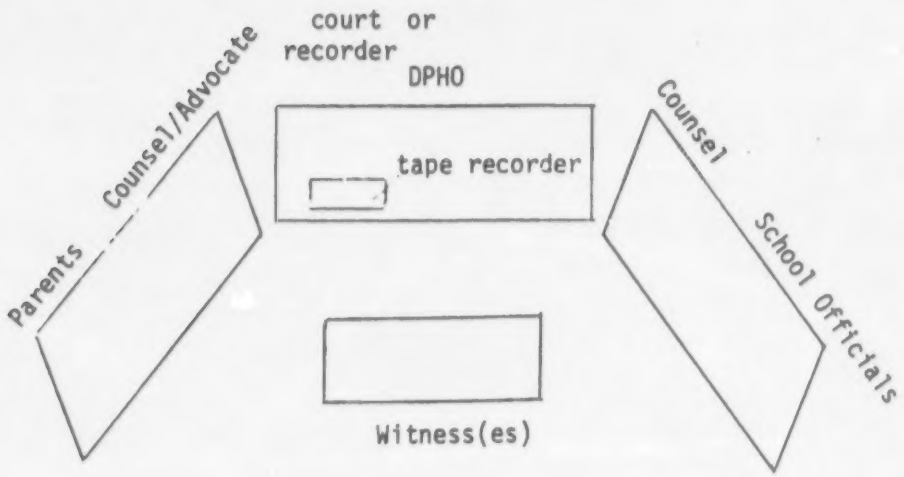
- (Please stand, raise your right hand) "In the testimony you are about to give, do you affirm that you will tell the whole truth and nothing but the truth?"

4. Physically arrange the room.

SEATING - Arrange the room so that there is a separate witness chair close to the recorder and to you. Other seating should be arranged accordingly.

The following seating arrangements are suggested depending upon the number of people involved in the hearing, and the type of facilities you are utilizing.





RECORDING - Check the tape recorder(s) to make sure it is working. Be sure to have at least six hours worth of cassettes readily available. Bring an extension cord with you.

You may want to use a reel-to-reel tape recorder or a tape recorder which singals the end of the tape. Otherwise, you will need to devise a method for signaling the end of the tape (e.g., a kitchen timer or an alarm clock).

When turning the tape, be sure to indicate a need to suspend any dialogue until the tape recorder is again operational. Be careful - be sure the leader on cassettes have passed before you continue as they do not record sound.

5. If the hearing is closed and you have decided to sequester the witnesses due to the confidentiality of the information, you should outline the procedures for calling them to testify.

   - You may wish to have a representative of the public agency act as an assistant to summon witnesses.

PRE-HEARING CONFERENCE

On the date of the hearing, you may wish to conduct a pre-hearing discussion with the legal representatives for the petitioner and respondent. This hearing may take place one-half hour or fifteen minutes before the scheduled time of the hearing. The purpose of this meeting may be:

1. To clarify the procedures that will be utilized in conducting the hearing;
2. To remind legal counsel that you are not conducting a court case but an administrative due process hearing and that you will not be ruling on the technicalities of law;
3. To specify that legal jargon should be kept to a minimum as it is not a court of law;
4. To remind legal counsel that you are conducting the hearing and will be in charge of the hearing at all times; and
5. To ascertain that all possibilities of negotiation between the two parties have been utilized.

2.0 SEQUENCE OF ACTIVITIES AND EVENTS: HEARING

	FROM HEARING CHECKLIST ACTIVITY NUMBER
INTRODUCTORY REMARKS	
To begin the Hearing the DPHO will . . .	
▶ Formally call the Hearing to order at the appointed time.	
▶ Identify the Hearing for the record or transcript; make a formal statement that: "The Impartial Due Process Hearing on behalf of child's legal name is now convened on date at time. The Impartial Hearing Officer presiding is legal name of DPHO of address. The Petitioner is legal name(s) of address.* The Respondent is legal name(s) of address.* The written request for the Hearing was submitted on date. The stated reason for the request was "written request."	2.1
*If a representative (as opposed to the parent or superintendent e.g. legal counsel) will present the case, the representative should also be introduced at this time.	
▶ Describe the Impartial Due Process Hearing e.g. an opportunity for parents and school district (or agency) personnel to meet before an unbiased individual--the Impartial Hearing Officer--when there are differences about any matter relating to the evaluation or educational placement of the child, or when the provision of a free and appropriate public education to a child cannot be resolved through conference and review procedures (e.g., Case Conference, Administrative Review)	2.2
▶ Describe the Role of the DPHO during the Hearing - to conduct the Hearing in an orderly manner - to provide an opportunity for full presentation of testimony - to arrive at a decision based solely on testimony and evidence presented during the Hearing	2.3

	FROM HEARING CHECKLIST ACTIVITY NUMBER
▶ Review the Hearing Procedures which will be followed Be sure to mention that--for purposes of recording the Hearing-all participants should . . . - identify themselves (by name) each time they speak - try to avoid using gestures (e.g. nodding head instead of <u>saying</u> "yes").	2.4
▶ Assure that parents have been given full opportunity to be notified, to understand, and to exercise their rights. <u>NOTE</u>: If any of the following are answered "No", the DPHO may wish to reschedule the Hearing to allow for compliance.	
● Ask if parents (1) received, (2) read, and (3) understood: 1. Written notification of the Hearing; 2. List (or Brochure) of Parents' Rights relating specifically to the activities before, during and after the Hearing.	2.5-2.10
● Ask if parents have had the <u>opportunity</u> to: (this means that they were informed of the right and were allowed the <u>option</u> to exercise the right	
1. access their child's school records (refers to written documents);	2.11
2. designate in writing the names of others who were given access to their child's school records (e.g. their psychologist or attorney);	2.12
3. obtain copies of school records at the actual cost of copying;	2.13
4. seek an Independent Evaluation (at their own expense, they may go to a qualified professional outside the school to obtain an assessment of their child) which may be used at the Hearing (i.e., entered into evidence or testimony);	2.14

	FROM HEARING CHECKLIST ACTIVITY NUMBER
5. request that school personnel--who have information relevant to the child--testify at the Hearing;	2.15
6. request that others--including legal counsel and specialists--testify at the Hearing;	2.16
7. request that the Hearing be open or closed to the public.	2.17
▶Ask if parents wish to have the Hearing open or closed to the public at this time (you may, at this time, clear the Hearing room if they have requested a closed Hearing).	
▶Ask the school if it has provided the parents access to all school records.	2.18
▶Ask if the Petitioner (or his representative) wishes to make a brief opening statement*.	2.19
▶Ask if the Respondent (or his representative) wishes to make a brief opening statement*.	2.20
*NOTE: No questions should be allowed during or after this statement.	
PRESENTATION OF EVIDENCE AND TESTIMONY	2.21
The DPHO will want to use the following guidelines during this phase of the Hearing:	
●The DPHO will ask that witnesses (other than the principle parties) leave the room until they are called to testify.*	
*NOTE: This is only done if the hearing has been requested to be a closed hearing.	
●The DPHO will call all witnesses for the Petitioner first (in the order requested by the Petitioner); then the DPHO will call all witnesses for the Respondent (in the order requested by the Respondent).	

FROM HEARING CHECKLIST
ACTIVITY NUMBER

- All witnesses should be seated near the DPHO and the tape recorder (or court reporter).

- Each time a new witness is called:

  1. The DPHO will administer the affirmation oath.

  2. The DPHO will ask him/her to identify himself/herself by: legal name
     address
     position or title
     relationship to child
     brief statement of reason for appearing.

  3. The party requesting the witness's testimony (Petitioner or Respondent) will be given the formal opportunity to ask questions (examine).

  4. The other party (Respondent or Petitioner) will be given the formal opportunity to challenge or cross-examine the testimony and evidence of the witness.

  5. A period will follow for recross-examination of testimony and evidence presented.

  6. The DPHO will ask if either the Petitioner or Respondent will require further testimony from the witness at a later time. The DPHO will excuse the witness at this time unless one of the parties has requested they remain available.

- When documentary evidence is submitted, the DPHO must . . .

  1. make a list containing the title (name) of each document and identifying it as as submitted by the Petitioner or the Respondent;

  2. keep a file of all documents entered into evidence.

- The DPHO may ask for clarification of testimony, terminology, or evidence when necessary.

	FROM HEARING CHECKLIST ACTIVITY NUMBER
● The Petitioner and the Respondent may enter a statement or evidence at any time for the purpose of having that evidence or statement show in the transcript (record) of the Hearing.	
CONCLUDING REMARKS	
▶ The DPHO asks if the Petitioner or Respondent have any additional statements or evidence they wish to enter into the Record of Hearing (i.e., to appear on the transcript of the Hearing).	2.22
▶ The DPHO then asks if (brief) summary statements will be given:	
● by the Petitioner (or his representative)	2.23
● by the Respondent (or his representative)	2.24
▶ The DPHO ends the Hearing with:	
● An overview of Due Process and Procedural Safeguards	
● What will happen next . . .	
The DPHO will arrive at a decision which they will receive within 45 days after the receipt of the request for a hearing.	2.25
Parents may request a verbatim record of the Hearing (one copy will, upon request, be furnished free by the school)	
A verbatim record may be either a transcript or an electronic recording.	
● A statement of the procedures for appeal following the Hearing.	2.26, 2.27

DPHO: HEARING CHECKLIST

ACTIVITY NUMBER	DESCRIPTION OF ACTIVITY & PROCEDURES		CHECK AS COMPLETED
	INTRODUCTORY REMARKS		
	DPHO TO PARTICIPANTS IN HEARING:		
2.1	▶ Identify Hearing: On Behalf of (child's name) Date DPHO (name) Name(s) of Petitioner Name(s) of Respondent Read Written Request for Hearing		_____
2.2	Describe Impartial Due Process Hearing		_____
2.3	Describe Role of DPHO During Hearing		_____
2.4	Review Hearing Procedures		_____
	DPHO TO PARENTS:		
	▶ Ask about		
	* Written Notification of Hearing		
2.5	Did parents receive it?	Yes No	_____
2.6	Did parents read it?	Yes No	_____
2.7	Did parents understand it?	Yes No	_____
	* List (Brochure) of Parents' Rights		
2.8	Did parents receive it?	Yes No	_____
2.9	Did parents read it?	Yes No	_____
2.10	Did parents understand it?	Yes No	_____
	▶ Ask if parents were given the opportunity to . . .		
2.11	Access their child's school records	Yes No	_____
2.12	Name others who were given access to their child's school records	Yes No	_____

ACTIVITY NUMBER	DESCRIPTION OF ACTIVITY & PROCEDURES		CHECK AS COMPLETED
2.13	Obtain copy of child's school record at cost of copying	Yes No	_____
2.14	Seek an Independent Evaluation	Yes No	_____
2.15	Request that school personnel testify at Hearing	Yes No	_____
2.16	Request that others (including legal counsel) testify at Hearing	Yes No	_____
	▶ Ask parents' wishes regarding Hearing . . .		
2.17	Would parents like the Hearing open or closed to the public?	Open Closed	_____
	COMMENTS:		
2.18	▶ Ask school if parents have had access to all school records	Yes No	_____
	DPHO TO PETITIONER:		
2.19	Ask if Petitioner (or Representative) will provide opening statement	Yes No	_____
	COMMENTS:		
	DPHO TO RESPONDENT:		
2.20	Ask if Respondent (or Representative) will provide opening statement	Yes No	_____

ACTIVITY NUMBER	DESCRIPTION OF ACTIVITY & PROCEDURES	CHECK AS COMPLETED
	COMMENTS:	

PRESENTATION OF EVIDENCE & TESTIMONY

	Representatives's Name/Title & Relationship to Child	Testifying at the Request of:	Oath Administered	Documentary Evidence Presented & Testimony Notes
2.21				

ACTIVITY NUMBER	DESCRIPTION OF ACTIVITY & PROCEDURES	CHECK AS COMPLETED
	CONCLUDING REMARKS	
	DPHO TO PETITIONER AND RESPONDENT:	
2.22	Were there additional (final) statements or evidence which either party wished to have entered as part of the transcript (record) of the Hearing? Yes No COMMENTS:	_____
	DPHO TO PETITIONER:	
2.23	Did the Petitioner give a summary statement? Yes No COMMENTS:	_____
	DPHO TO RESPONDENT:	
2.24	Did Respondent give a summary statement? Yes No COMMENTS:	_____
	DPHO TO PETITIONER AND RESPONDENT:	
2.25	Parents may request verbatim record of the Hearing. The DPHO will notify all parties of his decision within 45 official work days after the receipt of the request for a hearing.	_____

ACTIVITY NUMBER	DESCRIPTION OF ACTIVITY & PROCEDURES	CHECK AS COMPLETED
2.26	Either party may request a State-Level Review by contacting the Utah State Board of Education if dissatisfied with the decision and findings rendered in the impartial due process hearing.	_____
2.27	Either party may appeal to the District Court in the county of the child's residence if unsatisfied with final order of the State Board of Education.	_____

DPHO QUESTIONS & ANSWERS

A FEW "WHAT IF'S" . . . . . .

1. what if . . . the parents ask you for recommendations for independent evaluators, legal counsel or other types of references?

   Remember, you are an Impartial Hearing Officer. Your role is to act as a mediator or arbiter throughout the process--your role is not to act as a service to either party in the case. This means that you shall not offer recommendations to either party as it may be construed as favoritism and damage your "impartiality". You must state this position if the situation arises.

2. what if . . . either party in the case tries to give you "their side of the story" before the Hearing?

   Again, you must remember your impartiality. As your decision must be based on information presented during the Hearing, you should come into the Hearing with no preconceptions about the case. You must state this commitment if the situation arises.

3. what if . . . parents are not given access to their child's school records?

   The Hearing officer may reschedule the Hearing in order to allow the school district to provide the parents with access to the child's records.

4. what if . . . a participant uses a term with which a layman might be unfamiliar?

   It is your responsibility to ask for a definition or explanation of the term.

5. what if . . . witnesses' testimony becomes repetitive or too lengthy?

   You may request that they try to make their statements brief and to the point. You may ask them to confine their comments to the specific questions or issues being presented.

6. what if . . . the hearing becomes very emotional?

   You may wish to recess the hearing for a few minutes to allow the participants to regain their composure.

7. what if . . . the audience becomes disruptive in an open hearing?

   Remember, you are to conduct the hearing in an orderly manner. If the audience causes disruptions, you should warn the audience that you will not tolerate such interruptions and they should they continue, you will ask them to leave.

Section III

DIRECTIONS: For Questions 1-5, indicate which is included in the DPHO's opening or closing statements (opening or closing statement may be used more than once). (a) opening statement, (b) closing statement

Answer	Questions	Reference in Manual
_____	1. Identification of the hearing.	Page 67
_____	2. The appeal procedures.	Page 67
_____	3. An overview of what the hearing is.	Page 67
_____	4. When the decision will be sent to both parties.	Page 67
_____	5. Review of the hearing procedures.	Page 67

DIRECTIONS: For Questions 6-11, indicate whether the statement is true or false.

Answer	Questions	Reference in Manual
T F	6. The DPHO may hold a pre-hearing conference to try to mediate a decision prior to the hearing.	Page 70
T F	7. The DPHO is in charge of the hearing at all times.	Page 70
T F	8. The DPHO identifies the hearing by giving the child's legal name, date, and time of the hearing.	Page 71
T F	9. The LEA determines whether the hearing is open or closed.	Pages 72 & 73
T F	10. Only the petitioner or the respondent may make the opening statements.	Page 73
T F	11. The DPHO should allow for questions following the opening statements of the LEA and the parents.	Page 73

DIRECTIONS: For Questions 12-19, indicate which of the following rights are afforded to both the parents and LEA, the parents, or the LEA (the parties may be indicated more than once). (a) both the Lea and the parents, (b) the parents, (c) the LEA.

Answer	Questions	Reference in Manual
_____	12. The right to legal counsel.	Page 73

Answer		Questions	Reference in Manual
____	13.	The right of access to their child's record.	Page 72
____	14.	The right to designate others who may have access to the child's records.	Page 72
____	15.	The right to an independent evaluation.	Page 72
____	16.	The right to present evidence.	Page 72
____	17.	The right to a verbatim record of the hearing.	Page 75
____	18.	The opportunity to cross-examine all presentors at the hearing.	Page 74

DIRECTIONS: For Questions 20-28, indicate whether the statement is true or false.

Answer			Questions	Reference in Manual
T	F	20.	The DPHO must make a list containing the title of each document submitted into evidence.	Page 74
T	F	21.	The Petitioner and the Respondent may enter a statement or evidence into the record of the hearing at any time.	Page 75
T	F	22.	The DPHO may ask for clarification of testimony, terminology, or evidence only after a witness has finished his testimony.	Page 74
T	F	23.	If the hearing is closed, the DPHO should ask the witnesses to leave the room until they are called.	Page 73
T	F	24.	An affirmation oath may or may not be administered to each witness.	Page 74
T	F	25.	A verbatim record of the hearing may be either a transcript or an electronic recording.	Page 75

Answer		Questions	Reference in Manual
T	F	26. The DPHO may recess a hearing that becomes very emotional until the parties have regained their composure.	Page 82
T	F	27. If the audience becomes disruptive during the hearing, the DPHO should immediately close the hearing.	Page 82
T	F	28. The DPHO should recommend independent evaluators or legal counsel to the parents.	Page 82

IV. COMPLETING THE FINAL REPORT

SECTION IV

Goal

Upon completion of reading information about making the decision and writing the final report, the participant will be able to answer specific questions on these two activities with 80% accuracy.

The questions will be taken from the following specific objectives for Section IV:

1. Be able to list who receives a copy of the final report.
2. Be able to identify (by marking) what information should be included on the cover page of the final report.
3. Be able to identify (by marking) what should be included in the summary of the evidence and testimony section of the final report.
4. Be able to identify (by marking) what is included in the statements or testimony entered into the record section of the final report.
5. Be able to identify (by marking) what should be included in writing the decision and the rational section of the final report.
6. Be able to list the rights of both parties following a due process hearing.

ABOUT THE DECISION AND WRITING THE FINAL REPORT

- **What is the purpose of the decision?**

  The purpose of the decision is to summarize the pertinent evidence presented at the hearing and to make a logical conclusion based upon the evidence to decide the issue.

- **What are limitations in the decision making process?**

  The DPHO is limited to deciding the presenting complaint and should not go beyond that issue in his or her decision (e.g., if the parents contend that the school agency used improper evaluation methods and that the placement recommednation is invalid, the DPHO should limit the decision to the issue of the evaluation procedure.

  The DPHO must limit his or her decision to the evidence presented at the Hearing. The decision cannot be based upon material that has not been introduced, heresay, or personal assumptions.

  The DPHO must limit his or her decision to the type of placement in generic terms. The decision of the DPHO cannot require placement in a specific classroom.

- **What is the final report?**

  The Final Report is a written summary including the following:

  - identifying information about the Hearing
  - a summary of evidence and testimony presented
  - any material or statements specifically requested to appear in the record by any of the parties
  - the facts and findings or rationale and decision of the DPHO
  - a statement of the procedures necessary to obtain an appeal for review of the DPHO's decision.

- **Who prepares it?**

  The DPHO prepares the Final Report based solely on the evidence and testimony presented at the Hearing.

- **When is it submitted?**

  The Final Report must be completed and mailed within 45 official work days following the request for the Impartial Due Process Hearing.

- **How is it submitted?**

  The Final Report is considered "submitted" when typed copies are sent to all involved parties by Certified Mail, Return Receipt Requested.

- **Who receives a copy?**

  A copy of the Final Report is mailed to:

  1) The superintendent (or his designee) of the school district of the child's residence

  2) The child's parent, guardian or surrogate

  3) The child, if over 18 years of age

  4) The school district or agency providing the child's current educational program, if other than the school district of residence.

  5) The State Superintendent of Public Instruction
     Office of Utah State Board of Education
     250 East 5th South
     Salt Lake City, Utah 84111

- **Does the DPHO maintain a copy?**

  The DPHO maintains a copy of the verbatim transcript of the hearing, the submitted evidence, and the final report in his files.

3.0 COMPLETING THE FINAL REPORT

3.1 THE COVER PAGE

The cover page is a separate page for the identifying information of the Impartial Due Process Hearing. If the DPHO places the personally identifiable information on the cover page, and refers to the parties as petitioner and respondent, the decision could be forwarded for administrative review simply by removing the cover page.

The following lists suggestions and guidelines for completing the information requested:

"Date Submitted" refers to the actual date when the report will be mailed.

"Child's Student Number or Social Security Number" is utilized as a personal identifier for the hearing. If the child does not have either, you should list personal characteristics or other information which would make it possible to identify the child with reasonable certainty.

"School District" refers to the local school district.

"Superintendent" refers to the superintendent (or the superintendent of the designee) who contacted the DPHO initially to conduct the Hearing.

"Parents" refers to actual parents, legal guardians, or parent surrogates (if other than legal parents specify title or relationship to child in parentheses)

Try to use a quote from the written request for the Hearing to complete "Statement of Issue from Written Request for Hearing" - do <u>not</u> use inflamatory language.

Always use full legal names (nicknames may be listed in parentheses).

3.2 SUMMARY OF EVIDENCE AND TESTIMONY PRESENTED

Petitioner (P): list names and relationship to child
Respondent (R): (e.g. parent, school district superintendent)

<u>Remember, not to use personally identifying information in this section. Refer to the parties as the petitioner or respondent.</u>

3.2.1 Witnesses - This section lists and identifies all representatives called to testify.

"Order Called" - List consecutive numbers which will identify the sequential order in which witnesses testified. This number will also be used as a reference to identify witnesses in sections 3.2.2 and 3.2.3 (please see "Note" at the bottom of the form).

"At the Request of:" - Specify the party (petitioner or respondent) who originally requested the witness to appear at the Hearing. You may use the abbreviations (P) for Petitioner or (R) for Respondent.

"Name" - List the full legal name of the witness.

"Title/Relationship to Child" - Specify the witness's relationship to the child (e.g. aunt, classroom teacher) or title (physician, audiologist).

3.2.2 Documentary Evidence Submitted -

For each document submitted, list the witness's identifying number (see "Order Called" in 3.2.1 above) next to the name, title, or label of the document. Write (briefly) any important information next to the title. This would include purpose, relevance, or nature of the document.

3.2.3 Notes Regarding Testimony Presented -

For each witness, list his/her identifying number (see "Order Called" in 3.1 above) next to any notes which capsulize or summarize the relevant points of his/her testimony.

3.3 STATEMENTS OR TESTIMONY ENTERED INTO RECORD

This refers to verbatim statements or actual documents which either the petitioner or respondent requested to be entered into the record of the Hearing. Each should be identified by the requesting party (petitioner or respondent). Verbatim Statements should be in the form of quotes and should be taken directly from the transcript of the Hearing. Document titles should be listed and a copy of the document attached to the report.

3.4 WRITING THE DECISION AND THE RATIONALE

Your decision should be stated briefly and clearly to avoid the possibility of misinterpretation by readers. The rationale should provide a description and explanation of the facts and findings of the evidence presented during the Hearing which were the logical basis of your decision.

3.5 RIGHTS FOLLOWING A DUE PROCESS IMPARTIAL HEARING

The statements listed on the Final Report form must be included as part of the Final Report.

FINAL REPORT

IMPARTIAL DUE PROCESS HEARING

Date Submitted: _____

3.1 IDENTIFYING INFORMATION

Due Process Hearing Officer: _____

Impartial Due Process Hearing
on Behalf of: _____ (child's name) _____

Child's Student Number
(or Social Security Number):* _____

Child's Address: _____

Date of Hearing: _____

School District: _____

County: _____

Superintendent: _____

Parents: _____

Parents Address: _____

Date of Written Request for Hearing: _____

Initiated by: _____

Statement of Issue from Written Request
for Hearing: _____

* If the child does not have a student number or social security number, you should list personal characteristics or other information which would make it possible to identify the child with reasonable certainty.

3.2 SUMMARY OF EVIDENCE AND TESTIMONY PRESENTED

NOTE: Additional pages may be added as needed.

Petitioner (P)
Respondent (R)

3.2.1

WITNESSES/REPRESENTATIVES*			
ORDER CALLED	AT THE REQUEST OF:	NAME	TITLE/RELATIONSHIP TO CHILD
1.			
2.			
3.			
4.			
5.			

3.2.2

DOCUMENTARY EVIDENCE SUBMITTED	
1.	
2.	
3.	
4.	
5.	

* Witnesses are identified by the numberical order in which they are called to testify. Any Documentary Evidence submitted or notes regarding Testimony presented will be identified by the same number.

3.2.3

NOTES REGARDING TESTIMONY PRESENTED	
1.	
2.	
3.	
4.	
5.	

3.3 STATEMENTS OR TESTIMONY ENTERED INTO RECORD

3.4 DECISION AND RATIONALE

3.5 RIGHTS FOLLOWING A DUE PROCESS IMPARTIAL HEARING

You may request a verbatim transcript of the hearing;

If you are dissatisfied with the decision and findings rendered in the Impartial Due Process Hearing, you may request a State Level Review by contacting the Utah State Board of Education through:

State Superintendent of Public Instruction
Office of State Board of Education
250 East 500 South
Salt Lake City, Utah 84111

You may appeal to the District Court in the county of the child's residence, if you are not satisfied with the final order of the State Board of Education's review panel.

Section IV

DIRECTIONS: For Questions 1-5, indicate whether the statement is true or false.

Answer	Questions	Reference in Manual
T F	1. The purpose of the decision is to summarize the pertinent evidence present at the hearing and to make a logical conclusion based upon the evidence to decide the issue.	Page 84
T F	2. The DPHO does not have to limit his/her decision to the evidence presented at the hearing.	Page 84
T F	3. The DPHO must limit his/her decision to the type of placement in specific terms.	Page 84
T F	4. The final report must be completed and mailed within 15 official work days following the hearing.	Page 85
T F	5. The final report is mailed to the superintendent of the LEA, the parents, the child over 18, and the State Superintendent of Public Instruction.	Page 85

DIRECTIONS: For Questions 6-15, indicate what is included in which section of the final report (the sections may be used more than once). (a) the cover page; (b) summary of evidence and testimony presented; (c) statements or testimony entered into record; (d) writing the decision and the rationale; and (e) rights following an impartial due process hearing.

Answer	Questions	Reference in Manual
____	6. the request for a verbatim transcript of the record	Page 90
____	7. verbatim statements	Page 87
____	8. a brief and concise finding of facts	Page 87
____	9. identification of all representatives	Page 86
____	10. child's student number	Page 86
____	11. identification of the parents	Page 86
____	12. appeal procedures	Page 91

Answer	Questions	Reference in Manual
_____	13. actual documents submitted into evidence	Page 87
_____	14. order that the witnesses are called	Page 87
_____	15. the logical basis of the decision	Page 87

V. APPENDICES

APPENDIX A

AMENDED ANNUAL PROGRAM PLAN FOR FY 1981-83

UNDER P.L. 94-142, PART B

EDUCATION FOR ALL

HANDICAPPED CHILDREN ACT

APPENDIX A

AMENDED ANNUAL PROGRAM PLAN FOR FY 1981-83

UNDER P.L. 94-142, PART B

EDUCATION FOR ALL

HANDICAPPED CHILDREN ACT

VII. PROCEDURAL SAFEGUARDS

4. Due Process Hearing. The right to a due process hearing is guaranteed every parent, and upon written request for an impartial hearing, the LEA will initiate due process procedures.

   a. No employee or officer of the involved agency or any person having a personal or professional interest in the hearing may conduct such a hearing.

   b. Each public agency responsible for providing special education and related services shall implement a due process hearing upon request of the parents if they disagree with the public agency's proposal to initiate or change, or refusal to initiate or change, the identification, evaluation, educational placement or the provision of a free appropriate education. Procedures for conducting a due process hearing must meet standards established by the State Board of Education.

      1. Prerequisite to a hearing.

         a. Prior notice as described above should be provided to the parents.

         b. Within 15 days of receipt of the written request, the hearing officer will provide to the parents and to the officials of the LEA notification as to the time and place of the hearing, which shall be a time and place reasonably convenient for the parents.

      2. Procedures at the hearing. The due process hearing should be conducted in accordance with the following procedures:

         a. The parents and the LEA may have representatives, including, but not limited to, legal counsel or other professional persons, attend the hearing;

         b. The parents and the LEA, or their respective representatives, should have the right to present evidence;

c. The parents and the LEA, and their respective representatives should have an opportunity to question all presentors at the hearing;

d. If the child is over the age of majority, he or she should have the right to attend the hearing;

e. If the child has not reached the age of majority, the parents have the right to determine whether he/she should attend the hearing;

f. A verbatim record of the hearing should be made;

g. At all stages of the due process procedures, as needed, interpreters for the dear and/or interpreters fluent in the primary language of the home should be provided.

3. Parents have the right to be accompanied and advised by council or other persons with special knowledge or training with respect to the problems of handicapped children in the hearing; parents have the right to present evidence, confront, cross-examine, and request witnesses to attend the hearing; parents have the right to a verbatim record of the hearing; the right to written findings of facts and decisions.

4. Local Education Agencies will carry out all hearings, reviews, and other actions expeditiously with fair consideration of the issues involved, in a hearing completed within 45 days of the request, and at times and places convenient to the parents of the child involved.

5. A child involved in a due process procedure will remain in his/her present placement until completion of proceedings, or, if the hearing involves initial admission to public school, the child will be placed there until completion of the proceedings, unless otherwise agreed upon by the state or local education agency and the parents.

6. Impartiality (e.g., freedom from favoritism or bias, fairness) shall be insured in all due process proceedings by training impartial hearing officers whose duty will be to assure that proper procedures are followed and the rights of the parties are protected.

7. Procedures for Assigning Surrogates: Assignment of a surrogate to a particular child shall be made within 15 days of the child's eligibility determination according to the following procedures.

a. Any person whose work involves education or treatment of children who knows of a child possibly needing special education services and knows that the parents or guardians are not known, unavailable, or that the child is a ward of the State, should file a request for assignment of a surrogate to the child with the child's LEA.

b. In an effort to determine whether or not the parents or guardians are in fact unknown, unavailable, or the child is a ward of the State, the LEA should send a notice of the need for a surrogate to the adult in charge of the child's place of residence and to the parents or guardians at their last known address.

c. The LEA should confer with the local unit of the State Division of Family Services in determining whether or not the parents or guardians are unknown, unavailable, or the child is a ward of the State. This determination should be completed within a reasonable time. If it is determined that there is a need for a surrogate, such assignment should be completed within 15 days.

8. Surrogate Parents. In order to provide every child eligible a public education with the protection of procedural due process, even under circumstances where a child's parent or guardians are not known, are unavailable, or the child is a ward of the State, each child shall be assigned a parent surrogate. The LEA, in cooperation with the local unit of the State division of Family Services, shall maintain a registry of eligible persons who can serve as surrogate parents.

The surrogate may represent the child in all matters relating to the identification, evaluation and educational placement of the child, including the provision of a Free Appropriate Public Education (FAPE).

a. Qualifications of Surrogates. Persons selected as surrogates should (1) have no vested interest that would conflict with their primary allegiance to the child they would represent; and (2) to the extent possible, be of the same racial, cultural, linguistic and geographic background of the children they represent.

b. A surrogate will be committed to acquaint themselves, personally and thoroughly, with the child and the child's educational needs, and be familiar with the state and local educational system.

c. Surrogate parents will not be an employee of the state or local education agency.

d. Implementation of Procedural Safeguards Policy:

1. The 94-142 State Plan when adopted by the Utah State Board of Education becomes policy which must be complied with by the local education agencies in expenditure of federal funds received under this act.

2. Monitoring to assure the implementation of the Procedural Safeguard policy will be achieved by provision of T.A. by SEA staff and by program adults.

C. New Requirements

Upon adoption by the State Board of Education, the following policies and procedures relating to PROCEDURAL SAFEGUARDS will be in effect.

1. Independent Educational Evaluation

a. Each parent of a handicapped child has a right to obtain an independent educational evaluation of the child. The independent evaluation must be conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child.

b. The SEA will develop and maintain information about where an independent educational evaluation may be obtained and provide this information to the parent upon request.

c. The independent evaluation must be at public expense if the parent disagrees with the evaluation obtained by the public agency. The public agency, however, may initiate a due process hearing to show that its evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent maintains the right to an independent education evaluation but not at public expense.

d. Where a parent initiates an independent evaluation of a handicapped child at the parent's expense, the results of the evaluation, when provided by the parents to the public agency:

1. Must be considered by the public agency in decisions made with respect to providing a free and appropriate public education, and

2. May be presented as evidence at a due process hearing pertaining to that child.

e. When a request for an independent educational evaluation is made by the hearing officer, the evaluation must be at public expense.

f. Whenever an independent evaluation is made at public expense, the criteria under which the evaluation is obtained must be consistent with that criteria the public agency utilizes and must meet the minimum standards established by the State Education Agency.

2. Prior Notice and Parental Consent

a. Notice

The written notice provided to the parents of a handicapped child will be made available at a reasonable time before the public agency proposes to change the identification, evaluation or educational placement of the child or to provide a free and appropriate public education or if the public agency refuses to change the evaluation, identification or educational placement or to provide a free and appropriate public education, the notice must include:

1. A full explanation of the PROCEDURAL SAFEGUARDS, including due process procedure, protection in evaluation procedures, least restrictive environment and confidentially of information.

2. A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take action, and a description of any options the agency considered and the reasons why those options were rejected.

3. A description of the evaluation procedures, tests, records or reports the agency uses as a basis for the proposal or refusal.

4. A description of any other factors which are used or are relevant to the agency's proposal or refusal.

5. Language understandable to the general public.

6. A statement in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

7. Translation orally or by other means designed for the parent in his or her native language or other mode of communication.

8. Assurance that the parent understands the content of the notice.

9. Written evidence that the requirements of this section have been met.

b. Consent

Parental consent must be obtained prior to:

1. conducting a preplacement evaluation; and

2. initial placement of the handicapped child in a program providing special education and related services.

3. Procedures Where Parent Refuses Consent

Section VII, A., 2.(a), (i), with the exception of (ii), page 31 of the FY 78 APP, is incorporated by reference.

4. Inform Parents of Free/Low Cost Legal Services

The Utah State Board of Education will establish and maintain a register of free or low cost legal services, which it will make available to the parent when the information is requested in writing to the State Board of Education. In the event the parent requests and the public agency initiates a hearing regarding the identification, evaluation or placement of a handicapped child, the agency responsible for conducting the hearing will make this information available as part of the notice.

5. Register of Hearing Officers

The Utah State Board of Education will make available to each public agency a list of persons in the state trained to be impartial hearing officers. The hearing officer register will contain only those persons who have successfully completed the Utah State Board of Education approved training program or other acceptable training program for due process hearing officers. The public agency will select and assign its hearing officers from this register.

6. Hearing Rights

Any party to a hearing has the right to:

a. Be accompanied and advised by counsel and by others with special knowledge or training with respect to the problems of handicapped children.

b. Present evidence and confront, cross-examine and compel the attendance of witnesses.

c. Prohibit the introduction of any evidence at the hearing which has not been disclosed to that party at least five (5) days prior to the hearing. See definition of "days" in Section VII, page 29, of the FY 78 APP.

d. Obtain a written or electronic verbatim record of the hearing.

e. Obtain written findings of fact and decisions.

7. Parents Rights in Hearings

Parents are assured their right to have the child who is the subject of the hearing present and to determine whether the hearing shall be open or closed to the public.

8. Decision of Hearing Officer and Appeal

The hearing officer's decision shall be issued in accord with the following requirements:

a. Such decision will be in writing and shall be sent by certified mail within 45 days after the request for the hearing to the parents, to the Local Education Agency, and to their respective representatives;

b. The decision of the hearing officer will include findings of fact, conclusion and reasons for these findings and conclusions. If the decision is to disapprove a proposed education program, it will include a statement as to what is an adequate and appropriate educational program for the child. If the decision is to approve a proposed educational program, it should include a finding that a less restrictive program could not adequately and appropriately serve the child's educational needs;

c. The decision of the hearing officer shall be based solely on information and findings presented at the hearing;

d. A summary of the proceedings at the hearing will be made into which shall be included any materials or statements specifically requested by any of the parties to appear in the record and such summary shall be made available to the parties to the hearing;

e. The decision of the hearing officer is binding upon the parents and upon the Local Education Agency, its officers, employees and agents, unless a party to the hearing appeals the decision to the SEA or district court of jurisdiction.

9. Administrative Appeal: Duties of Reviewing Officer

a. When a hearing is conducted by a public agency other than the State Education Agency, any parties aggrieved by the findings and decision of the hearing officer may appeal to the State Education Agency. The appeal and request for an impartial review by the State Board of Education must be made in writing, within 30 days of the receipt of the hearing officer's decision, to the State Board of Education by the party appealing the decision.

b. If there is an appeal, the State Board of Education shall provide for an impartial review of the hearing not later than 30 days after the receipt of the request. The official or tribunal conducting the review shall:

1. Examine the entire hearing record;

2. Insure the procedures at the hearing were consistent with the requirements of due process;

3. Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in Section VII, B.6. apply above.

4. Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official;

5. Make an independent decision on completion of the review;

6. Provide a copy of written findings and the decision to the parties within 30 days of the request for the review;

7. The decision made by the review official is final, unless a party brings a civil action.

10. Timelines and Convenience of Hearings and Reviews

a. The public agency shall insure that not later than 45 days after the receipt of a request for a hearing that:

1. A final decision is reached in the hearing; and

2. A copy of the decision is mailed to each of the parties.

b. The State Education Agency shall insure that not later than 30 days after the receipt of a request for an impartial review:

1. A final decision is reached in the review; and

2. A copy of the decision is mailed to each of the parties.

c. A hearing or reviewing officer may grant specific extensions of time beyond the periods set out.

d. Each hearing and each review involving oral arguments must be conducted at a time and place which is reasonably convenient to the parties involved.

11. Implementation Procedures - State Education Agency

Each public agency is provided with a copy of the Annual Program Plan which outlines the requirements for compliance with PROCEDURAL SAFEGUARDS.

Each Local Education Agency application must describe the policies and procedures to be utilized in carrying out the provisions of the Act. The Local Education Agency application, when submitted to the State Education Agency, is approved as to content and periodic administrative program reviews will determine compliance. As a part of the comprehensive personnel development program, inservice training is provided the Local Education Agency and the State Education Agency's Special Education staff.

APPENDIX B

SAMPLE OPENING STATEMENT

APPENDIX B

SAMPLE OPENING STATEMENT

Name
Hearing Officer
Address

Child's Name, by and through his/her father/mother, Petitioner's Name vs School District	ADMINISTRATIVE DUE PROCESS HEARING

For the Petitioner: (legal Counsel's name or representative)

For the Respondent: (legal Counsel's name or representative)

The Impartial Due Process Hearing on behalf of (Child's Name), by and through her father/mother (Petitioner's Name) is now convened at (time) on (date) in the (location).

The Impartial Due Process Hearing Officer presiding is (Hearing Officer's Name) of (Address).

The Petitioner is (Child's Name), by and through her father/mother, (Petitioner's Name), who is represented by (Legal Counsel's Name). The Petitioner resides at (Address). Counsel for the Petitioner is a resident attorney with the firm of (Firm's Name) of (Address).

The Respondent is the (School District) whose central office is located at (Address). (Representative's Name), Director of Special Programs for the (School District) will represent the Respondent in this matter. (Legal Counsel's Name or Representative) is accompanied by Counsel of Record, (Legal Counsel's Name). Counsel of Record for the (School District) is with the firm of (Firm's Name) located at (Address).

The written request for this Hearing was submitted in writing by (Petitioner's Name) on (Date) pursuant to Section 504 of the Rehabilitation Act of 1973 and Public Law 94-142. At that time, (Petitioner's Name) indicated that he/she was initiating a "formal request for an appeal hearing before the (Name) Board of Education" on his/her request that a (Reason for Request).

It is noted for the record that the Hearing date (date) is in compliance with the State Board of Education Amended Annual Program Plan for FY 1978 Under Public Law 94-142, Part B (Chapter VII, 4.b.).

The purpose of this Impartial Due Process Hearing is to provide an opportunity for both the parents and the school district to meet before an unbiased individual--the Impartial Due Process Hearing Officer--to resolve differences which could not be resolved through conference and administrative review pursuant to Public Law 93-380 as amended by Public Law 94-142 and the Utah State Board of Education Amended Annual Program Plan for FY 1978 under Part B of the Education of the Handicapped Act as Amended by Public Law 94-142.

As Hearing Officer in this matter it is my role to:

1. Conduct this Hearing in an orderly manner.
2. Provide an opportunity for full presentation of testimony and evidence from both parties.
3. Arrive at a decision based solely on the testimony and evidence presented during the Hearing.

It should be noted for the record that this is not a court of law and matters involving technical points of law are not germane. This is an inappropriate forum for such matters.

It is germane and appropriate, however, that this Hearing result in an Educational decision and to assure that both the parents and the School

District have been given a full opportunity to present the reasons for their respective actions based on the evidence and testimony presented during the course of this Hearing.

To assure that both parties involved in this Hearing have a full opportunity to present their evidence and testimony regarding this matter, all comments will be directed to the Hearing Officer. Only the parties involved and witnesses will be recognized by the Hearing Officer. There will be no comments from observers to these proceedings.

After I have asked the Petitioner, (Petitioners Name), a number of questions that must be entered in the record, the Hearing will proceed as follows:

1. Each side (the Petitioner or his representative, and the Respondent, or his representative,) will be given an opportunity to make a brief opening statement. The purpose of this statement is to specify the reasons for requesting this hearing and to indicate what the Petitioner and the Respondent expect as an outcome of the Hearing. No evidence or testimony regarding the matter will be accepted during these opening statements. There will be no discussion of these opening remarks.
2. Following the opening statements, the Petitioner will be asked to present his witnesses and evidence. Since there will be an opportunity for examination, cross-examination and re-examination of each witness, all witnesses will be asked to affirm that his testimony is the truth and the whole truth. Witnesses will be called in the order requested by the Petitioner and the Respondent.

QUESTIONS FOR THE PETITIONER

1. Did you receive, read and understand all communications regarding this Hearing?
2. Did you receive, read and understand the written statement of your rights as parents?
3. Were you given the opportunity to access your child's school records?
4. Were you given the opportunity to name others who were given access to your child's school records?
5. Were you given the opportunity to obtain a copy of your child's school records at the cost of copying?
6. Were you given the opportunity to seek an independent evaluation of your child?
7. Were you given the opportunity to request that school personnel testify at this Hearing?
8. Were you given the opportunity to request that others testify at this Hearing?
9. Is it your wish that this Hearing be open to the public?

OPENING STATEMENT FOR THE PETITIONER

(Reminder that the statement should be brief and specify the reason for the hearing and any expected outcomes.)

OPENING STATEMENT FOR THE RESPONDENT

(Reminder that the statement should be brief and specify the reason for the hearing and any expected outcomes.)

CALL FIRST WITNESS FOR THE PETITIONER

APPENDIX C

SAMPLE CLOSING STATEMENT

APPENDIX C

SAMPLE CLOSING STATEMENT

CONCLUDING REMARKS:

Are there any additional statements or evidence which either party wishes to have entered as part of the record of this Hearing?

TO PETITIONER:

Does the Petitioner or his representative wish to give a summary statement?

TO RESPONDENT:

Does the Respondent or his representative wish to give a summary statement?

Summary:

Either the Petitioner, (Petitioner's Name), or the Respondent, (School District's Name), may request a verbatim record of this Hearing.

As Hearing Officer I will notify all parties in this matter of my decision within 15 working days as required by Chapter VII of the Amended Annual Program Plan for FY 1978, Under Public Law 94-142, Part B as Adopted by the State Board of Education, July 7, 1977.

Either party may request a State-Level Review by contacting the Utah State Board of Education if dissatisfied with the decision and findings rendered in this Hearing.

Either party may appeal to the Court of Appropriate jurisdiction if unsatisfied with the final order of the State Board of Education.

It should be noted that (Child's Name) shall remain in his/her present educational placement as provided under Public Law 94-142 until receipt of the Hearing Officer's decision and findings and, if appealed to the Utah State Board of Education shall remain in her present educational placement during the pendency of any proceedings conducted pursuant to this section, unless the State or local school district and the parents otherwise agree.

Appendix D

CONSTITUTIONAL AND LEGISLATIVE BACKGROUND

Appendix D

CONSTITUTIONAL AND LEGISLATIVE BACKGROUND

Constitutional Protections

Through long-standing tradition, the states have provided public education for almost all children in the United States. But because many handicapped children were left outside traditional school patterns, constitutional guarantees of equal treatment and due process were brought to bear by advocates of handicapped children.

The Fifth Amendment (on due process) and the Fourteenth Amendment (on due process and equal protection) have been cited as guaranteeing the rights of handicapped children to a public education. More recently, the Eighth Amendment has been cited as extending protection to handicapped persons in institutions, because without education, training and habilitation, the constitutional right to be free from harm is violated [Halderman v. Pennhurst, C.A. No. 74-1345 (E.D. Pa. December 23, 1977)].

Federal Case Law

The basis for the current right-to-education cases may be traced to the landmark decision in Brown v. The Board of Education in 1954. In this decision, the U. S. Supreme Court stated:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today, it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education (345 U.S. 483, 493).

The Brown decision related to public school segregation on the basis of race, but the fundamental positions in the decision formed the basis of future arguments relating to education for handicapped children.

The most useful concepts pertinent to the basic formulation of a right-to-education argument emanate from the principles of equal protection and due process in the U. S. Constitution. Equal protection relates to the idea that individuals in similar circumstances must receive similar treatment. Due process relates to the utilization of fair procedures in reaching a decision.

These two concepts are stated clearly in the landmark cases relating to the right to education for handicapped children: Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971) and Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866 (D. D.C. 1972).

The PARC case was brought before the court by the parents of 14 mentally retarded children and all other children similarly situated. The court approved a stipulation providing that no mentally retarded child could be reassigned or initially assigned to either a special education class or a regular education class or could be excluded from a public school without a hearing before a hearing officer. In addition, the court outlined a comprehensive, 23-step due process procedure to be utilized in making any changes relating to a mentally retarded child's educational status.

In the PARC decree, the court stated that:

> . . . a mentally retarded person can benefit at any point in his life and development from a program of education.

The court, believing in the benefits of education, went on to require the state to locate, evaluate, and reevaluate all school-aged children who had been excluded from public schools. Public schools were required to provide retarded children with a free, appropriate education, preferably in a regular classroom.

Whereas the PARC decision specifically concerned mentally retarded children, the Mills decision extended the due process procedures applied in PARC to all handicapped children. The Mills case established two basic safeguards applying to the public education of handicapped children. First, exclusion from a public school pro-

gram could not take place unless suitable, alternative educational services were provided, and second, there must be a prior due process hearing and periodic review of the child's educational status and progress.

Both the Mills and PARC cases established an increasingly important educational concept that has come to be termed "the least restrictive environment." The foundation of this concept, as stated in PARC, follows:

> . . . among the alternative programs of education and training required by statute to be available, placement in a regular public school class is preferable to placement in a special public school class, and placement in a special public school class is preferable to placement in any other type of education and training (343 F. Supp., 307).

Federal Legislation

Reacting to rising parental demands and to improved educational technology demonstrated within the right to education litigation, Congress, in a nearly unanimous vote, enacted Public Law (PL) 94-142, the Education for All Handicapped Children Act of 1975. Congress recognizes that the education of all children is a responsibility of state governments. Nevertheless, Congress also asserted the federal responsibility of providing financial assistance to the states in order to provide additional funds for the education of handicapped children. In return for these funds, PL 94-142 requires each state to adopt policies and procedures which are consistent with the Act and which guarantee the right to education for all handicapped children.

PL 94-142 expands the due process procedures that were set out in the prior litigation relating to the right to education and the initial codification contained in PL 93-380 (The Education Amendments of 1974). That law required the provision of notice to parents and the opportunity for an impartial hearing prior to the change of any educational program for handicapped children. PL 94-142 expands these provisions to include the right to counsel, the right to examine witnesses, the right to a verbatim record of the hearing, and the right to a written decision within a specified time period. PL 94-142 and the Office of Education

regulations implementing the law represent the most comprehensive statement of due process pertaining to handicapped children to date.

An associated piece of legislation, the Rehabilitation Act of 1973 (PL 93-112), contains provisions within Section 504 that also impact on the education of handicapped children. Essentially, Section 504 is a statement of rights for the handicapped. It states:

> No otherwise qualified handicapped individual in the United States as defined, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

The provisions of Section 504 apply to all programs receiving federal assistance, regardless of level: preschool, elementary, secondary, postsecondary, adult or vocational. The regulations published to implement the Act specifically state that they were developed to conform to the provisions included in PARC, Mills, and PL 94-142. Section 504 carries sanctions in that noncompliance can involve the loss of all federal dollars, whereas previous noncompliance with PL 94-142 endangered only the dollars allocated under that Act.

The legislation noted above (PL 94-142 and Sec. 504, PL 93-112) is joined by still another piece of legislation, The Developmentally Disabled Assistance and Bill of Rights (42 U.S.C. [S8S8] 6001-6080). On April 20, 1981, the United States Supreme Court, in a limited decision with potentially widespread implications for institutional rights, has overruled the Third Circuit and concluded there is no mandatory obligation on states who receive funds under the Developmental Disabilities Act to provide habilitation or treatment in the least restrictive environment [Penhurst v Halderman, 49 USLW 4363 (U. S. April 20, 1981)]. Many controversial issues remain as a result of the Penhurst Case. One issue seems clear, however; namely, the legislation failed to put the states on sufficient notice that they would have to provide appropriate habilitation in the least restrictive setting. In order to create such an obligation Congress must do so explicitly, which it failed to do in this situation.

For a more comprehensive discussion of the Penhurst Case readers are encouraged to secure the May-June issue of Mental Disability Law Reporter where two articles appear. One of

the articles consists of a summary and analysis of the controversial Pennhurst case and the other discusses the Supreme Court issues. The Mental Disability Law Reporter may be secured by writing the National Legal Resource Center for Child Advocacy and Protection, 1800 M Street, N. W., 2nd Floor, South Lobby, Washington, D. C. 20036. Telephone 202-331-2250.

Because P. L. 94-142, P. L. 93-112 and the Developmentally Disabled Assistance Bill of Rights may be subject to significant changes in the years ahead due process hearing officers and other parties involved in disputed cases involving the handicapped would do well to rely first on State statutes and the Rules and Regulations promulgated thereunder.

Appendix E

RULES AND REGULATIONS FOR PUBLIC LAW 94-142 AND FOR SPECIFIC LEARNING DISABILITIES

INDEX TO FEDERAL REGULATIONS

IN RE: DUE PROCESS

ZERO REJECT:

1. Sec. 300.300: SEA failure to insure compliance with dates-certain and ages-certain requirement

2. Sec. 300.302: SEA and LEA failure to comply with free residential placement requirement

3. Sec. 300.303: SEA and LEA failure to provide for proper functioning of hearing aids

4. Sec. 300.305: SEA and LEA failure to provide for program options including art, music, home economics, and vocational education

5. Sec. 300.306: SEA and LEA failure to provide nonacademic services

6. Sec. 300.307: SEA and LEA failure to provide physical education

7. Sec. 300.320, 321, 323, and 324: SEA and LEA failure to comply with service priorities requirement

8. Sec. 300.401: SEA failure to insure that children placed by LEA in private schools (a) receive special education and related services and (b) have all the rights of handicapped children served by the public schools

9. Sec. 300.403: If parents place the child in private school, SEA or LEA failure to provide services to the child according to Sec. 300.450-460, but either the SEA or the LEA may initiate a due process hearing on the appropriateness of an LEA program or the question of financial responsibility

10. Sec. 300.451: If a child is in private school by parent placement, SEA failure to provide for the child's participation in federally funded programs (failure to assure special education or related services) or SEA failure to insure that LEAs comply with Sec. 300.452-460

11. Sec. 300.452, 453, 455: LEA failure to (a) provide special education and related services to handicapped children in private school, (b) provide such children a genuine opportunity to participate in public programs, (c) provide them with special education and related service comparable in quality, scope, and participation to those for handicapped children in public programs, and (d) use funds consistent with requirements for nondiscrimination in public programs (per Sec. 300.456, 457, 458, 459, and 460)

NONDISCRIMINATORY EVALUATION:

1. Sec. 300.530: SEA or LEA failure to select and administer testing and evaluation materials and procedures that are not racially or culturally discriminatory

2. Sec. 300.531: SEA or LEA failure to do individualized evaluation (per Sec. 300.532) before initial placement

3. Sec. 300.532: SEA or LEA failure to comply with evaluation procedures before initial placement

4. Sec. 300.533: SEA or LEA failure to comply with placement procedures, including interpreting evaluations

5. Sec. 300.534: SEA of LEA failure to review the child's individualized education program (IEP) and perform reevaluation every three years or more often if warranted or requested by parent

INDIVIDUALIZED EDUCATION PROGRAMS:

1. Sec. 300.341: SEA failure to provide for IEPs for handicapped children in private schools

2. Sec. 300.342: SEA or LEA failure to comply with deadline for IEP development (at the beginning of the school year)

3. Sec. 300.343: SEA or LEA failure to initiate the meeting, have the conference when required, or review the IEP annually

4. Sec. 300.344: SEA or LEA failure to have all required parties at the IEP meeting

5. Sec. 300.345: SEA or LEA failure to provide for parent's participation at the IEP meeting

6. Sec. 300.346: SEA or LEA failure to write an IEP with proper content

7. Sec. 300.347: SEA or LEA failure with respect to handicapped children in private school to initiate or conduct an IEP meeting, have private school participation at the meeting, or review IEPs annually

8. Sec. 300.348: SEA or LEA failure with respect to children enrolled in both public and private schools to have an IEP meeting or have private school participation at the meeting

9. Sec. 300.349: SEA or LEA failure to provide special education and related services as required by the child's IEP

LEAST RESTRICTIVE ENVIRONMENT:

1. Sec. 300.550(b): SEA or LEA failure to comply with the LRE requirement

2. Sec. 300.551: SEA or LEA failure to insure a continuum of alternative placements, including separate education and resource or itinerant teachers

3. Sec. 300.552: SEA or LEA failure to make an annual determination of placement, based on the child's IEP, as close as possible to the child's home; make program alternatives available to the extent necessary to implement the child's IEP; place the child in the school he would attend if he were not handicapped, unless his IEP calls for a different placement; or consider any potential harmful effect of placement on the child or the quality of services he needs

4. Sec. 300.553: SEA or LEA failure to provide or arrange for nonacademic and extracurricular services and activities in the LRE

5. Sec. 300.554: SEA failure to implement the LRE for handicapped children in public and private institutions (other than schools)

PARENT PARTICIPATION:

1. Sec. 300.561: SEA failure to notify parents concerning the adoption of the state plan and amendments and major identification, location, and evaluation activities

2. Sec. 300.562: SEA or LEA failure to grant parents access to records concerning their children, upon request, and before the IEP meeting or due process hearing at which the issue is the child's identification, evaluation, or placement, and to comply with the required elements or parent access

3. Sec. 300.563: SEA or LEA failure to keep record of parental access

4. Sec. 300.566: SEA or LEA failure to charge reasonable fees for copying of records (not excessively high fees)

5. Sec. 300.567, 568, 569, and 570: SEA or LEA failure to amend records at parent's request

6. Sec. 300.573: SEA or LEA failure to destroy information not needed to serve the child, at parent's request

Education of the Handicapped Regulations
ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN
(34 Code of Federal Regulations Part 300)

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Officers should have access to this publication

Education of the Handicapped Regulations
ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN
(34 Code of Federal Regulations Part 300)

Subpart A—General

PURPOSE, APPLICABILITY, AND GENERAL PROVISIONS REGULATIONS

Reg. 300.1 Purpose.

The purpose of this part is:

(a) To insure that all handicapped children have available to them a free appropriate public education which includes special education and related services to meet their unique needs,

(b) To insure that the rights of handicapped children and their parents are protected,

(c) To assist States and localities to provide for the education of all handicapped children, and

(d) To assess and insure the effectiveness of efforts to educate those children.

(20 U.S.C. 1401 Note)

Reg. 300.2 Applicability to State, local, and private agencies.

(a) *States*. This part applies to each State which receives payments under Part B of the Education of the Handicapped Act.

(b) *Public agencies within the State*. The annual program plan is submitted by the State educational agency on behalf of the State as a whole. Therefore, the provisions of this part apply to all political subdivisions of the State that are involved in the education of handicapped children. These would include: (1) The State educational agency, (2) local educational agencies and intermediate educational units, (3) other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for the deaf or blind), and (4) State correctional facilities.

(c) *Private schools and facilities*. Each public agency in the State is responsible for insuring that the rights and protections under this part are given to children referred to or placed in private schools and facilities by that public agency.

(See Regs. 300.400-300.403)
(20 U.S.C. 1412(1), (6); 1413(a); 1413(a)(4)(B))

Comment. The requirements of this part are binding on each public agency that has direct or delegated authority to provide special education and related services in a State that receives funds under Part B of the Act, regardless of whether that agency is receiving funds under Part B.

Reg. 300.3 Regulations that apply to Assistance to States for Education of Handicapped Children.

(a) *Regulations*. The following regulations apply to this program of Assistance to States for Education of Handicapped Children.

(2) The Education Division General Administrative Regulations (EDGAR) in 34 CFR Part 76 (State-Administered Programs) and Part 77 (Definitions).

(2) The regulations in this Part 300.

(b) *How to use regulations; how to apply for funds*. The "Introduction to Regulations of the Education Division" at the beginning of EDGAR includes general information to assist in—

(1) Using regulations that apply to Education Division programs; and

(2) Apply for assistance under an Education Division program.

(20 U.S.C. 1221e-3(a)(1))

[Amended in 45 Fed. Reg. 22531 (April 3, 1980).]

DEFINITIONS

Comment. Definitions of terms that are used throughout these regulations are included in this subpart. Other terms are defined in the specific subparts in which they are used. Below is a list of those terms and the specific sections and subparts in which they are defined:

Consent (Section 300.500 of Subpart E)
Destruction (Section 300.560 of Subpart E)
Direct services (Section 300.370(b)(1) of Subpart C)
Evaluation (Section 300.500 of Subpart E)
First priority children (Section 300.320(a) of Subpart C)
Independent educational evaluation (Section 300.503 of Subpart E)
Individualized education program (Section 300.340 of Subpart C)
Participating agency (Section 300.560 of Subpart E)
Personally identifiable (Section 300.500 of Subpart E)
Private school handicapped children (Section 300.450 of Subpart D)
Public expense (Section 300.503 of Subpart E)
Second priority children (Section 300.320(b) of Subpart C)
Special definition of "State" (Section 300.700 of Subpart G)
Support services (Section 300.370(b)(2) of Subpart C)

Reg. 300.4 Free appropriate public education.

As used in this part, the term "free appropriate public education" means special education and related services which:

(a) Are provided at public expense, under public supervision and direction, and without charge.

(b) Meet the standards of the State educational agency, including the requirements of this part,

(c) Include preschool, elementary school, or secondary school education in the State involved, and

(d) Are provided in conformity with an individualized education program which meets the requirements under Regs. 300.340-300.349 of Subpart C.

(20 U.S.C. 1401(18))

Reg. 300.5 Handicapped children.

(a) As used in this part, the term "handicapped children" means those children evaluated in accordance with Regs. 300.530-300.534 as being mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, deaf-blind, multi-handicapped, or as having specific learning disabilities, who because of those impairments need special education and related services.

(b) The terms used in this definition are defined as follows:

(1) "Deaf" means a hearing impairment which is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, which adversely affects educational performance.

(2) "Deaf-blind" means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational problems that they cannot be accommodated in special education programs solely for deaf or blind children.

(3) "Hard of Hearing" means a hearing impairment, whether permanent or fluctuating, which adversely affects a child's educational performance but which is not included under the definition of "deaf" in this section.

(4) "Mentally retarded" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, which adversely affects a child's educational performance.

(5) "Multihandicapped" means concomitant impairments (such as mentally retarded-blind, mentally retarded-orthopedically impaired, etc.), the combination of which causes such severe educational problems that they cannot be accommodated in special education programs solely for one of the impairments. The term does not include deaf-blind children.

(6) "Orthopedically impaired" means a severe orthopedic impairment which adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly (e.g., clubfoot, absence of some member, etc.), impairments caused by disease (e.g. poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns which cause contractures).

(7) "Other health impaired" means

(i) having an autistic condition which is manifested by severe communication and other developmental and educational problems; or

(ii) having limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes, which adversely affects a child's educational performance.

(8) "Seriously emotionally disturbed" is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance:

(A) An inability to learn which cannot be explained by intellectual, sensory, or health factors;

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(C) Inappropriate types of behavior or feelings under normal circumstances;

(D) A general pervasive mood of unhappiness or depression; or

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes children who are schizophrenic. The term does not include children who are socially maladjusted, unless it is determined that they are seriously emotionally disturbed.

(9) "Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain disfunction, dyslexia, and developmental aphasia. The term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(10) "Speech impaired" means a communication disorder such as stuttering, impaired articulation, a language impairment, or a voice impairment, which adversely affects a child's educational performance.

(11) "Visually handicapped" means a visual impairment which, even with correction, adversely affects a child's educational performance. The term includes both partially seeing and blind children.

(20 U.S.C. 1401(1),(15))

[Subparagraph (b)(9) amended in 42 Fed. Reg. 65083 (Dec. 29, 1977).]

[Subparagraphs (b)(7) and (b)(8) amended in 46 Fed. Reg. 3865 (Jan. 16, 1981).]

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Reg. 300.6 Include.

As used in this part, the term "include" means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.

(20 U.S.C. 1417(b))

Reg. 300.7 Intermediate educational unit.

As used in this part, the term "intermediate educational unit" means any public authority, other than a local educational agency, which:

(a) Is under the general supervision of a State educational agency;

(b) Is established by State law for the purpose of providing free public education on a regional basis; and

(c) Provides special education and related services to handicapped children within that State.

(20 U.S.C. 1401 (22))

Reg. 300.8 Local educational agency.

(a) For the purposes of this part, the term "local educational agency" also includes intermediate educational units.

(20 U.S.C. 1401 (8))

[Amended in 45 Fed. Reg. 22531 (April 3, 1980).]

Reg. 300.9 Native language.

As used in this part, the term "native language" has the meaning given that term by section 703(a)(2) of the Bilingual Education Act, which provides as follows:

The term "native language", when used with reference to a person of limited English-speaking ability, means the language normally used by that person, or in the case of a child, the language normally used by the parents of the child.

(20 U.S.C. 880b-1(a)(2); 1401(21))

Comment. Section 602(21) of the Education of the Handicapped Act states that the term "native language" has the same meaning as the definition from the Bilingual Education Act. (The term is used in the prior notice and evaluation sections under Reg. 300.505(b)(2) and Reg. 300.532(a)(1) of Subpart E.) In using the term, the Act does not prevent the following means of communication:

(1) In all direct contact with a child (including evaluation of the child), communication would be in the language normally used by the child and not that of the parents, if there is a difference between the two.

(2) If a person is deaf or blind, or has no written language, the mode of communication would be that normally used by the person (such as sign language, braille, or oral communication).

Reg. 300.10 Parent.

As used in this part, the term "parent" means a parent, a guardian, a person acting as a parent of a child, or a surrogate parent who has been appointed in accordance with Reg. 300.514. The term does not include the State if the child is a ward of the State.

(20 U.S.C. 1415)

Comment. The term "parent" is defined to include persons acting in the place of a parent, such as a grandmother or stepparent with whom a child lives, as well as persons who are legally responsible for a child's welfare.

Reg. 300.11 Public Agency.

As used in this part, the term "public agency" includes the State educational agency, local educational agencies, intermediate educational units, and any other political subdivisions of the State which are responsible for providing education to handicapped children.

(20 U.S.C. 1412(2)(B); 1412(6); (1413(a))

Reg. 300.12 Qualified.

As used in this part, the term "qualified" means that a person has met State educational agency approved or recognized certification, licensing, registration, or other comparable requirements which apply to the area in which he or she is providing special education or related services.

(20 U.S.C. 1417(b))

Reg. 300.13 Related services.

(a) As used in this part, the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

(b) The terms used in this definition are defined as follows:

(1) "Audiology" includes:

(i) Identification of children with hearing loss;

(ii) Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing;

(iii) Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lipreading), hearing evaluation, and speech conservation;

(iv) Creation and administration of programs for prevention of hearing loss;

(v) Counseling and guidance of pupils, parents, and teachers regarding hearing loss; and

(vi) Determination of the child's need for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(2) "Counseling services" means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

(3) "Early identification" means the implementation of a formal plan for identifying a disability as early as possible in a child's life.

(4) "Medical services" means services provided by a licensed physician to determine a child's medically related handicapping condition which results in the child's need for special education and related services.

(5) "Occupational therapy" includes:

(i) Improving, developing or restoring functions impaired or lost through illness, injury, or deprivation;

(ii) Improving ability to perform tasks for independent functioning when functions are impaired or lost; and

(iii) Preventing, through early intervention, initial or further impairment or loss of function.

(6) "Parent counseling and training" means assisting parents in understanding the special needs of their child and providing parents with information about child development.

(7) "Physical therapy" means services provided by a qualified physical therapist.

(8) "Psychological services" include:

(i) Administering psychological and educational tests, and other assessment procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning.

(iv) Consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interviews, and behavioral evaluations; and

(v) Planning and managing a program of psychological services, including psychological counseling for children and parents.

(9) "Recreation" includes:

(i) Assessment of leisure function;

(ii) Therapeutic recreation services;

(iii) Recreation programs in schools and community agencies; and

(iv) Leisure education.

(10) "School health services" means services provided by a qualified school nurse or other qualified person.

(11) "Social work services in schools" include:

(i) Preparing a social or developmental history on a handicapped child;

(ii) Group and individual counseling with the child and family;

(iii) Working with those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school; and

(iv) Mobilizing school and community resources to enable the child to receive maximum benefit from his or her educational program.

(12) "Speech pathology" includes:

(i) Identification of children with speech or language disorders;

(ii) Diagnosis and appraisal of specific speech or language disorders;

(iii) Referral for medical or other professional attention necessary for the habilitation of speech or language disorders;

(iv) Provisions of speech and language services for the habilitation or prevention of communicative disorders; and

(v) Counseling and guidance of parents, children, and teachers regarding speech and language disorders.

(13) "Transportation" includes:

(i) Travel to and from school and between schools,

(ii) Travel in and around school buildings, and

(iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a handicapped child.

(20 U.S.C. 1401(17))

Comment. With respect to related services, the Senate Report states:

The Committee bill provides a definition of "related services," making clear that all such related services may not be required for each individual child and that such term includes early identification and assessment of handicapping conditions and the provision of services to minimize the effects of such conditions.

(Senate Report No. 94-168, p. 12 (1975))

The list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music, and dance therapy), if they are required to assist a handicapped child to benefit from special education.

There are certain kinds of services which might be provided by persons from varying professional backgrounds and with a variety of operational titles, depending upon requirements in individual States. For example, counseling services might be provided by social workers, psychologists, or guidance counselors; and psychological testing might be done by qualified psychological

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examiners, psychometrists, or psychologists, depending upon State standards.

Each related service defined under this part may include appropriate administrative and supervisory activities that are necessary for program planning, management, and evaluation.

Reg. 300.14 Special education.

(a)(1) As used in this part, the term "special education" means specially designed instruction, at no cost to the parent, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(2) The term includes speech pathology, or any other related service, if the service consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child, and is considered "special education" rather than a "related service" under State standards.

(3) The term also includes vocational education if it consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child.

(b) The terms in this definition are defined as follows:

(1) "At no cost" means that all specially designed instruction is provided without charge, but does not preclude incidental fees which are normally charged to nonhandicapped students or their parents as a part of the regular education program.

(2) "Physical education" is defined as follows:

(i) The term means the development of:

(A) Physical and motor fitness;

(B) Fundamental motor skills and patterns; and

(C) Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports).

(ii) The term includes special physical education, adapted physical education, movement education, and motor development.

(20 U.S.C. 1401(16))

(3) "Vocational education" means organized educational programs which are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree.

(20 U.S.C. 1401(16))

Comment. (1) The definition of "special education" is a particularly important one under these regulations, since a child is not handicapped unless he or she needs special education. (See the definition of "handicapped children" in section 300.5.) The definition of "related services" (section 300.13) also depends on this definition, since a related service must be necessary for a child to benefit from special education. Therefore, if a child does not need special education, there can be no "related services," and the child (because not "handicapped") is not covered under the Act.

(2) The above definition of vocational education is taken from the Vocational Education Act of 1963, as amended by Pub. L. 94-482. Under that Act, "vocational education" includes industrial arts and consumer and homemaking education programs.

Subpart B—State Annual Program Plans and Local Applications

ANNUAL PROGRAM PLANS—GENERAL

Reg. 300.110 Condition of assistance.

In order to receive funds under Part B of the Act for any fiscal year, a State must submit an annual program plan to the Commissioner through its State educational agency.

(20 U.S.C. 1232c(b), 1412, 1413)

Reg. 300.111 Contents of plan.

Each annual program plan must contain the provisions required in this subpart.

(20 U.S.C. 1412, 1413, 1232c(b))

ANNUAL PROGRAM PLANS—CONTENTS

Reg. 300.121 Right to a free appropriate public education.

(a) Each annual program plan must include information which shows that the State has in effect a policy which insures that all handicapped children have the right to a free appropriate public education within the age ranges and timelines under Reg. 300.122.

(b) The information must include a copy of each State statute, court order, State Attorney General opinion, and other State document that shows the source of the policy.

(c) The information must show that the policy:

(1) Applies to all public agencies in the State;

(2) Applies to all handicapped children;

(3) Implements the priorities established under Reg. 300.127(a)(1) of this subpart; and

(4) Establishes timeliness for implementing the policy, in accordance with Reg. 300.122.

(20 U.S.C. 1412(1), (2)(B), (6); 1413(a)(3))

[illegible]. 300.122 Timeliness and ages for free appropriate public education.

(a) *General.* Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken in order to insure that a free appropriate public education is available for all handicapped children aged three through eighteen within the State not later than September 1, 1978, and for all handicapped children aged three through twenty-one within the State not later than September 1, 1980.

(b) *Documents relating to timeliness.* Each annual program plan must include a copy of each statute, court order, attorney general decision, and other State document which demonstrates that the State has established timelines in accordance with paragraph (a) of this section.

(c) *Exception.* The requirement in paragraph (a) of this section does not apply to a State with respect to handicapped children aged three, four, five, eighteen, nineteen, twenty, or twenty-one to the extent that the requirement would be inconsistent with State law or practice, or the order of any court, respecting public education for one or more of those age groups in the State.

(d) *Documents relating to exceptions.* Each annual program plan must:

(1) Describe in detail the extent to which the exception in paragraph (c) of this section applies to the State, and

(2) Include a copy of each State law, court order, and other document which provides a basis for the exception.

(20 U.S.C. 1412(2)(B))

Reg. 300.123 Full educational opportunity goal.

Each annual program plan must include in detail the policies and procedures which the State will undertake, or has undertaken, in order to insure that the State has a goal of providing full educational opportunity to all handicapped children aged birth through twenty-one.

(20 U.S.C. 1412(2)(A))

Reg. 300.124 Full educational opportunity goal—data requirement.

Beginning with school year 1978-1979, each annual program plan must contain the following information:

(a) The estimated number of handicapped children who need special education and related services.

(b) For the current school year:

(1) The number of handicapped children aged birth through two, who are receiving special education and related services; and

(2) The number of handicapped children:

(i) Who are receiving a free appropriate public education,

(ii) Who need, but are not receiving a free appropriate public education,

(iii) Who are enrolled in public and private institutions and are receiving a free appropriate public education, and

(iv) Who are enrolled in public and private institutions and are not receiving a free appropriate public education.

(c)The estimated numbers of handicapped children who are expected to receive special education and related services during the next school year.

(d) A description of the basis used to determine the data required under this section.

(e) The data required by paragraphs (a), (b), and (c) of this section must be provided:

(1) For each disability category (except for children aged birth through two), and

(2) For each of the following age ranges: birth through two, three through five, six through seventeen, and eighteen through twenty-one.

(20 U.S.C. 1412(2)(A))

Comment. In Part B of the Act, the term "disability" is used interchangeably with "handicapping condition". For consistency in this regulation, a child with a "disability" means a child with one of the impairments listed in the definition of "handicapped children" in Reg. 300.5, if the child needs special education because of the impairment. In essence, there is a continuum of impairments. When an impairment is of such a nature that the child needs special education, it is referred to as a disability, in these regulations, and the child is a "handicapped" child.

States should note that data required under this section are not to be transmitted to the Commissioner in personally identifiable form. Generally, except for such purposes as monitoring and auditing, neither the States nor the Federal Government should have to collect data under this part in personally identifiable form.

Reg. 300.125 Full educational opportunity goal—timetable.

(a) *General requirement.* Each annual program plan must contain a detailed timetable for accomplishing the goal of providing full educational opportunity for all handicapped children.

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(b) *Content of timetable.* (1) The timetable must indicate what percent of the total estimated number of handicapped children the State expects to have full educational opportunity in each succeeding school year.

(2) The data required under this paragraph must be provided:

(i) For each disability category (except for children aged birth through two), and

(ii) For each of the following age ranges: birth through two, three through five, six through seventeen, and eighteen through twenty-one.

(20 U.S.C. 1412(2)(A))

Reg. 300.126 Full educational opportunity goal—facilities, personnel, and services.

(a) *General requirement.* Each annual program plan must include a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet the goal of providing full educational opportunity for all handicapped children. The State educational agency shall include the data required under paragraph (b) of this section and whatever additional data are necessary to meet the requirement.

(b) *Statistical description.* Each annual program plan must include the following data:

(1) The number of additional special class teachers, resource room teachers, and itinerant or consultant teachers needed for each disability category and the number of each of these who are currently employed in the State.

(2) The number of other additional personnel needed, and the number currently employed in the State, including school psychologists, school social workers, occupational therapists, physical therapists, home-hospital teachers, speech-language pathologists, audiologists, teacher aides, vocational education teachers, work study coordinators, physical education teachers, therapeutic recreation specialists, diagnostic personnel, supervisors, and other instructional and non-instructional staff.

(3) The total number of personnel reported under paragraph (b) (1) and (2) of this section, and the salary costs of those personnel.

(4) The number and kind of facilities needed for handicapped children and the number and kind currently in use in the State, including regular classes serving handicapped children, self-contained classes on a regular school campus, resource rooms, private special education day schools, public special education day schools, private special education residential schools, public special education residential schools, hospital programs, occupational therapy facilities, physical therapy facilities, public sheltered workshops, private sheltered workshops, and other types of facilities.

(5) The total number of transportation units needed for handicapped children, the number of transportation units designed for handicapped children which are in use in the State, and the number of handicapped children who use these units to benefit from special education.

(c) *Data categories.* The data required under paragraph (b) of this section must be provided as follows:

(1) Estimates for serving all handicapped children who require special education and related services,

(2) Current year data, based on the actual numbers of handicapped children receiving special education and related services (as reported under Subpart G), and

(3) Estimates for the next school year.

(d) *Rationale.* Each annual program plan must include a description of the means used to determine the number and salary costs of personnel.

(20 U.S.C. 1412(2)(A))

Reg. 300.127 Priorities.

(a) *General requirement.* Each annual program plan must include information which shows that:

(1) The State has established priorities which meet the requirements under Regs. 300.320-300.324 of Subpart C.

(2) The State priorities meet the timelines under Reg. 300.122 of this subpart, and

(3) The State has made progress in meeting those timelines.

(b) *Child data.* (1) Each annual program plan must show the number of handicapped children known by the State to be in each of the first two priority groups named in Reg. 300.321 of Subpart C:

(i) By disability category, and

(ii) By the age ranges in Reg. 300.124(e)(2) of this subpart.

(c) *Activities and resources.* Each annual program plan must show for each of the first two priority groups:

(1) The programs, services, and activities that are being carried out in the State,

(2) The Federal, State, and local resources that have been committed during the current school year, and

(3) The programs, services, activities, and resources that are to be provided during the next school year.

(20 U.S.C. 1412(3))

Reg. 300.128 Identification, location, and evaluation of handicapped children.

(a) *General requirement.* Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken to insure that:

(1) All children who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated; and

(2) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

(b) *Information.* Each annual program plan must:

(1) Designate the State agency (if other than the State educational agency) responsible for coordinating the planning and implementation of the policies and procedures under paragraph (a) of this section;

(2) Name each agency that participates in the planning and implementation and describe the nature and extent of its participation;

(3) Describe the extent to which:

(i) The activities described in paragraph (a) of this section have been achieved under the current annual program plan, and

(ii) The resources named for these activities in that plan have been used;

(4) Describe each type of activity to be carried out during next school year, including the role of the agency named er paragraph (b)(1) of this section, timelines for completing those activities, resources that will be used, and expected outcomes;

(5) Describe how the policies and procedures under paragraph (a) of this section will be monitored to insure that the State educational agency obtains:

(i) The number of handicappped children within each disability category that have been identified, located, and evaluated, and

(ii) Information adequate to evaluate the effectiveness of those policies and procedures; and

(6) Describe the method the State uses to determine which children are currently receiving special education and related services and which children are not receiving special education and related services.

(20 U.S.C. 1412(2)(C))

Comment. The State is responsible for insuring that all handicapped children are identified, located, and evaluated, including children in all public and private agencies and institutions in the State. Collection and use of data are subject to the confidentiality requirements in Regs. 300.560-300.576

Reg. 300.129 Confidentiality of personally identifiable information.

(a) Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken in order to insure the protection of the confidentiality of any personally identifiable information collected, used, or maintained under this part.

(b) The Commissioner shall use the criteria in Regs. 300.560-300.576 of Subpart E to evaluate the policies and procedures of the State under paragraph (a) of this section.

(20 U.S.C. 1412(2)(D); 1417(c))

Comment. The confidentiality regulations were published in the Federal Register in final form on February 27, 1976 (41 FR 8603-8610), and met the requirements of Part B of the Act, as amended by Pub. L. 94-142. Those regulations are incorporated in Regs. 300.560-300.576 of Subpart E.

Reg. 300.130 Individualized education programs.

(a) Each annual program plan must include information which shows that each public agency in the State maintains records of the individualized education program for each handicapped child, and each public agency establishes, reviews, and revises each program as provided in Subpart C.

(b) Each annual program plan must include:

(1) A copy of each State statute, policy, and standard that regulates the manner in which individualized education programs are developed, implemented, reviewed, and revised, and

(2) The procedures which the State educational agency follows in monitoring and evaluating those programs.

(20 U.S.C. 1412(4))

Reg. 300.131 Procedural safeguards.

Each annual program plan must include procedural safeguards which insure that the requirements in Regs. 300.500-300.514 of Subpart E are met.

(20 U.S.C. 1412(5)(A))

Reg. 300.132 Least restrictive environment.

(a) Each annual program plan must include procedures which insure that the requirements in Regs. 300.550-300.556 of Subpart E are met.

(b) Each annual program plan must include the following information:

(1) The number of handicapped children in the State, within each disability category, who are participating in

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regular education programs, consistent with Regs. 300.550-300.556 of Subpart E.

(2) The number of handicapped children who are in separate classes or separate school facilities, or who are otherwise removed from the regular education environment.

(20 U.S.C. 1412(5)(B))

Reg. 300.133 Protection in evaluation procedures.

Each annual program plan must include procedures which insure that the requirements in Regs. 300.530-300.534 of Subpart E are met.

(20 U.S.C. 1412(5)(C))

Reg. 300.134 Responsibility of State educational agency for all educational programs.

(a) Each annual program plan must include information which shows that the requirements in Reg. 300.600 of Subpart F are met.

(b) The information under paragraph (a) of this section must include a copy of each State statute, State regulation, signed agreement between respective agency officials, and any other document that shows compliance with that paragraph.

(20 U.S.C. 1412(6))

Reg. 300.136 Implementation procedures—State educational agency.

Each annual program plan must describe the procedures the State educational agency follows to inform each public agency of its responsibility for insuring effective implementation of procedural safeguards for the handicapped children served by that public agency.

(20 U.S.C. 1412(6))

Reg. 300.137 Procedures for consultation.

Each annual program plan must include an assurance that in carrying out the requirements of section 612 of the Act, procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents of handicapped children.

(20 U.S.C. 1412(7)(A))

Reg. 300.138 Other Federal programs.

Each annual program plan must provide that programs and procedures are established to insure that funds received by the State or any public agency in the State under any other Federal program, including section 121 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241e-2), section 305(b)(8) of that Act (20 U.S.C. 844a(b)(8)) or Title IV-C of that Act (20 U.S.C. 1831), and section 110(a) of the Vocational Education Act of 1963, under which there is specific authority for assistance for the education of handicapped children, are used by the State, only in a manner consistent with the goal of providing free appropriate public education for all handicapped children, except that nothing in this section limits the specific requirements of the laws governing those Federal programs.

(20 U.S.C. 1413(a)(2))

Reg. 300.139 Comprehensive system of personnel development.

Each annual program plan must include the material required under Regs. 300.380-300.387 of Subpart C.

(20 U.S.C. 1413(a)(3))

Reg. 300.140 Private schools.

Each annual program plan must include policies and procedures which insure that the requirements of Subpart D are met.

(20 U.S.C. 1413(a)(4))

Reg. 300.141 Recovery of funds for misclassified children.

Each annual program plan must include policies and procedures which insure that the State seeks to recover any funds provided under Part B of the Act for services to a child who is determined to be erroneously classified as eligible to be counted under section 611(a) or (d) of the Act.

(20 U.S.C. 1413(a)(5))

Reg. 300.144 Hearing on application.

Each annual program plan must include procedures to insure that the State educational agency does not take any final action with respect to an application submitted by a local educational agency before giving the local educational agency reasonable notice and an opportunity for a hearing.

(20 U.S.C. 1413(a)(8))

Reg. 300.145 Prohibition of commingling.

Each annual program plan must provide assurance satisfactory to the Commissioner that funds provided under Part B of the Act are not commingled with State funds.

(20 U.S.C. 1413(a)(9))

Comment. This assurance is satisfied by the use of a separate accounting system that includes an "audit trail" of the expenditure of the Part B funds. Separate bank accounts are not required. (See 34 CFR 76, Subpart F (Cash Depositories).)

Reg. 300.146 Annual evaluation.

Each annual program plan must include procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of handicapped children, including evaluation of individualized education programs.

(20 U.S.C. 1413(a)(11))

Reg. 300.147 State advisory panel.

Each annual program plan must provide that the requirements of Regs. 300.650-300.653 of Subpart F are met.

(20 U.S.C. 1413(a)(12))

Reg. 300.148 Policies and procedures for use of Part B funds.

Each annual program plan must set forth policies and procedures designed to insure that funds paid to the State under Part B of the Act are spent in accordance with the provisions of Part B, with particular attention given to sections 611(b), 611(c), 611(d), 612(2), and 612(3) of the Act.

(20 U.S.C. 1413(a)(1))

Reg. 300.149 Description of use of Part B funds.

(a) *State allocation.* Each annual program plan must include the following information about the State's use of funds under Reg. 300.370 of Subpart C and Reg. 300.620 of Subpart F:

(1) A list of administrative positions, and a description of duties for each person whose salary is paid in whole or in part with those funds.

(2) For each position, the percentage of salary paid with those funds.

(3) A description of each administrative activity the State educational agency will carry out during the next school year with those funds.

(4) A description of each direct service and each support service which the State educational agency will provide during the next school year with those funds, and the activities the State advisory panel will undertake during that period with those funds.

(b) *Local educational agency allocation.* Each annual program plan must include:

(1) An estimate of the number and percent of local educational agencies in the State which will receive an allocation under this part (other than local educational agencies which submit a consolidated application),

(2) An estimate of the number of local educational agencies which will receive an allocation under a consolidated application,

(3) An estimate of the number of consolidated applications and the average number of local educational agencies per application, and

(4) A description of direct services the State educational agency will provide under Reg. 300.360 of Subpart C.

(20 U.S.C. 1232c(b)(1)(B)(ii))

Reg. 300.151 Additional information if the State educational agency provides direct services.

If a State educational agency provides free appropriate public education for handicapped children or provides them with direct services, its annual program plan must include the information required under Regs. 300.226-300.228, 300.231, and 300.235.

(20 U.S.C. 1413(b))

LOCAL EDUCATIONAL AGENCY APPLICATIONS—GENERAL

Reg. 300.180 Submission of application.

In order to receive payments under Part B of the Act for any fiscal year a local educational agency must submit an application to the State educational agency.

(20 U.S.C. 1414(a))

Reg. 300.182 The excess cost requirement.

A local educational agency may only use funds under Part B of the Act for the excess costs of providing special education and related services for handicapped children.

(20 U.S.C. 1414(a)(1), (a)(2)(B)(i))

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Reg. 300.183 Meeting the excess cost requirement.

(a) A local educational agency meets the excess cost requirement if it has on the average spent at least the amount determined under Reg. 300.184 for the education of each of its handicapped children. This amount may not include capital outlay or debt service.

(20 U.S.C. 1401(20); 1414(a)(1))

[Amended in 45 Fed Reg. 22531 (April 3, 1980).]

Comment. The excess cost requirement means that the local educational agency must spend a certain minimum amount for the education of its handicapped children before Part B funds are used. This insures that children served with Part B funds have at least the same average amount spent on them, from sources other than Part B, as do the children in the school district taken as a whole.

The minimum amount that must be spent for the education of handicapped children is computed under a statutory formula. Section 300.184 implements this formula and gives a step-by-step method to determine the minimum amount. Excess costs are those costs of special education and related services which exceed the minimum amount. Therefore, if a local educational agency can show that it has (on the average) spent the minimum amount for the education of each of its handicapped children, it has met the excess cost requirement, and all additional costs are excess costs. Part B funds can then be used to pay for these additional costs, subject to other requirements of Part B (priorities, etc.). In the "Comment" under section 300.184, there is an example of how the minimum amount is computed.

Reg. 300.184 Excess costs—computation of minimum amount.

The minimum average amount a local educational agency must spend under Reg. 300.183 for the education of each of its handicapped children is computed as follows:

(a) Add all expenditures of the local educational agency in the preceding school year, except capital outlay and debt service:

(1) For elementary school students, if the handicapped child is an elementary school student, or

(2) For secondary school students, if the handicapped child is a secondary school student.

(b) From this amount, subtract the total of the following amounts spent for elementary school students or for secondary school students, as the case may be:

(1) Amounts the agency spent in the preceding school year from funds awarded under Part B of the Act and Titles I and VII of the Elementary and Secondary Education Act of 1965, and

(2) Amounts from State and local funds which the agency spent in the preceding school year for:

(i) Programs for handicapped children,

(ii) Programs to meet the special educational needs of educationally deprived children, and

(iii) Programs of bilingual education for children with limited English-speaking ability.

(c) Divide the result under paragraph (b) of this section by the average number of students enrolled in the agency in the preceding school year:

(1) In its elementary schools, if the handicapped child is an elementary school student, or

(2) In its secondary schools, if the handicapped child is a secondary school student.

(20 U.S.C. 1414(a)(1))

Comment. The following is an example of how a local educational agency might compute the average minimum amount it must spend for the education of each of its handicapped children, under Reg. 300.183. This example follows the formula in Reg. 300.184. Under the statute and regulations, the local educational agency must make one computation for handicapped children in its elementary schools and a separate computation for handicapped children in its secondary schools. The computation for handicapped school students would be done as follows:

a. First, the local educational agency must determine its total amount of expenditures for elementary school students from all sources—local, State, and Federal (including Part B)—in the preceding school year. Only capital outlay and debt service are excluded.

Example: A local educational agency spent the following amounts last year for elementary school students (including its handicapped elementary school students):

(1)	From local tax funds	$2,750,000
(2)	From State funds	7,000,000
(3)	From Federal funds	750,000
		10,500,000

Of this total, $500,000 was for capital outlay and debt service relating to the education of elementary school students. This must be subtracted from total expenditures:

	$10,500,000
	—500,000
Total expenditures for elementary school students (less capital outlay and debt service)	10,000,000

b. Next, the local educational agency must subtract amounts spent for:

(1) Programs for handicapped children;

(2) Programs to meet the special educational needs of educationally deprived children; and

(3) Programs of bilingual education for children with limited English-speaking ability.

These are funds which the local educational agency actually spent, not funds received last year but carried over for the current school year.

Example: The local educational agency spent the following amounts for elementary school students last year:

(1) From funds under Title I of the Elementary and Secondary Education Act of 1965	$300,000
(2) From a special State program for educationally deprived children	200,000
(3) From a grant under Part B	200,000
(4) From State funds for the education of handicapped children	500,000
(5) From a locally-funded program for handicapped children	250,000
(6) From a grant for a bilingual education program under Title VII of the Elementary and Secondary Education Act of 1965	150,000
Total	1,600,000

A local educational agency would also include any other funds it ...ent from Federal, State, or local sources for the three basic purposes: handicapped children, educationally deprived children, and bilingual education for children with limited English-speaking ability.)

This amount is subtracted from the local educational agency's total expenditure for elementary school students computed above:

$10,000,000
—1,600,000
8,400,000

c. The local educational agency next must divide by the average number of students enrolled in the elementary schools of the agency last year (including its handicapped students).

Example: Last year, an average of 7,000 students were enrolled in the agency's elementary schools. This must be divided into the amount computed under the above paragraph:

$8,400,000/7,000 students equals $1,200/student.

This figure is in the minimum amount the local educational agency must spend (on the average) for the education of each of its handicapped students. Funds under Part B may be used only for costs over and above this minimum. In this example, if the local educational agency has 100 handicapped elementary school students, it must keep records adequate to show that it has spent at least $120,000 for the education of those students (100 students times $1,200/student), not including capital outlay and debt service.

This $120,000 may come from any funds except funds under Part B, subject to any legal requirements that govern the use of those other funds.

If the local educational agency has handicapped secondary school students, it must do the same computation for them. However the amounts used in the computation would be those the local educational agency spent last year for the education of secondary school students, rather than for elementary school students.

Reg. 300.185 Computation of excess costs—consolidated application.

The minimum average amount under Reg. 300.183 where two or more local educational agencies submit a consolidated application, is the average of the combined minimum average amounts determined under Reg. 300.184 in those agencies for elementary or secondary school students, as the case may be.

(20 U.S.C. 1414(a)(1))

Reg. 300.186 Excess costs—limitation on use of Part B funds.

(a) The excess cost requirement prevents a local educational agency from using funds provided under Part B of the Act to pay for all of the costs directly attributable to the education of a handicapped child, subject to paragraph (b) of this section.

(b) The excess cost requirement does not prevent a local educational agency from using Part B funds to pay for all of the costs directly attributable to the education of a handicapped child in any of the age ranges three, four, five, eighteen, nineteen, twenty, or twenty-one, if no local or State funds are available for nonhandicapped children in that age range. However, the local educational agency must comply with the nonsupplanting and other requirements of this part in providing the education and services.

(20 U.S.C. 1402(20); 1414(a)(1))

Reg. 300.190 Consolidated applications.

(b) *Required applications.* A State educational agency may require local educational agencies to submit a consolidated application for payments under Part B of the Act if the State educational agency determines that an individual application submitted by a local educational agency will be disapproved because:

(1) The agency's entitlement is less than the $7,500 minimum required by section 611(c)(4)(A)(i) of the Act (Reg. 300.360(a)(1) of Subpart C); or

(2) The agency is unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of handicapped children.

(c) *Size and scope of program.* The State educational agency shall establish standards and procedures for determinations under paragraph (b)(2) of this section.

(20 U.S.C. 1414(c)(1))

[Amended in 45 Fed. Reg. 22531 (April 3, 1980).]

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Reg. 300.192 State regulation of consolidated applications.

(a) The State educational agency shall issue regulations with respect to consolidated applications submitted under this part.

(b) The State educational agency's regulations must:

(1) Be consistent with Section 612(1)-(7) and Section 613(a) of the Act, and

(2) Provide participating local educational agencies with joint responsibilities for implementing programs receiving payments under this part.

(20 U.S.C. 1414(c)(2)(B))

(c) If an intermediate educational unit is required under State law to carry out this part, the joint responsibilities given to local educational agencies under paragraph (b)(2) of this section do not apply to the administration and disbursement of any payments received by the intermediate educational unit. Those administrative responsibilities must be carried out exclusively by the intermediate educational unit.

(20 U.S.C. 1414(c)(2)(C))

Reg. 300.193 State educational agency approval; disapproval.

(c) In carrying out its functions under this section, each State educational agency shall consider any decision resulting from a hearing under Regs. 300.506-300.513 of Subpart E which is adverse to the local educational agency involved in the decision.

(20 U.S.C. 1414(b)(3))

[Amended in 45 Fed. Reg. 22531 (April 3, 1980).]

Reg. 300.194 Withholding.

(a) If a State educational agency, after giving reasonable notice and an opportunity for a hearing to a local educational agency, decides that the local educational agency in the administration of an application approved by the State educational agency has failed to comply with any requirement in the application, the State educational agency, after giving notice to the local educational agency, shall:

(1) Make no further payments to the local educational agency until the State educational agency is satisfied that there is no longer any failure to comply with the requirement; or

(2) Consider its decision in its review of any application made by the local educational agency under Reg. 300.180;

(3) Or both.

(b) Any local educational agency receiving a notice from a State educational agency under paragraph (a) of this section is subject to the public notice provision in Reg. 300.592.

(20 U.S.C. 1414(b)(2))

LOCAL EDUCATIONAL AGENCY APPLICATIONS—CONTENTS

Reg. 300.220 Child identification.

Each application must include procedures which insure that all children residing within the jurisdiction of the local educational agency who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, including a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

(20 U.S.C. 1414(a)(1)(A))

Comment. The local educational agency is responsible for insuring that all handicapped children within its jurisdiction are identified, located, and evaluated, including children in all public and private agencies and institutions within that jurisdiction. Collection and use of data are subject to the confidentiality requirements in Regs. 300.560-300.576 of Subpart E.

Reg. 300.221 Confidentiality of personally identifiable information.

Each application must include policies and procedures which insure that the criteria in Regs. 300.560-300.574 of Subpart E are met.

(20 U.S.C. 1414(a)(1)(B))

Reg. 300.222 Full educational opportunity goal; timetable.

Each application must: (a) Include a goal of providing full educational opportunity to all handicapped childen, aged birth through 21, and

(b) Include a detailed timetable for accomplishing the goal.

(20 U.S.C. 1414(a)(1)(C), (D))

Reg. 300.223 Facilities, personnel, and services.

Each application must provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal in Reg. 300.222.

(20 U.S.C. 1414(a)(1)(E))

Reg. 300.224 Personnel development.

Each application must include procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under Reg. 300.140.

(20 U.S.C. 1414(a)(1)(C)(i))

g. 300.225 Priorities.

Each application must include priorities which meet the requirements of Regs. 300.320-300.324.

(20 U.S.C. 1414(a)(1)(C)(ii))

Reg. 300.226 Parent involvement.

Each application must include procedures to insure that, in meeting the goal under Reg. 300.222, the local educational agency makes provision for participation of and consultation with parents or guardians of handicapped children.

(20 U.S.C. 1414(a)(1)(C)(iii))

Reg. 300.227 Participation in regular education programs.

(a) Each application must include procedures to insure that to the maximum extent practicable, and consistent with Regs. 300.550-300.553 of Subpart E, the local educational agency provides special services to enable handicapped children to participate in regular educational programs.

(b) Each application must describe:

(1) The types of alternative placements that are available for handicapped children, and

(2) The number of handicapped children within each disability category who are served in each type of placement.

U.S.C. 1414(a)(1)(C)(iv))

Reg. 300.229 Excess cost.

Each application must provide assurance satisfactory to the State educational agency that the local educational agency uses funds provided under Part B of the Act only for costs which exceed the amount computed under Reg. 300.184 and which are directly attributable to the education of handicapped children.

(20 U.S.C. 1414(a)(2)(B))

Reg. 300.230 Nonsupplanting.

(a) Each application must provide assurance satisfactory to the State educational agency that the local educational agency uses funds provided under Part B of the Act to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant those State and local funds.

(b) To meet the requirement in paragraph (a) of this section:

(1) The total amount or average per capita amount of State and local school funds budgeted by the local educational agency for expenditures in the current fiscal year for the education of handicapped children must be at least equal to the total amount or average per capita amount of State and local school funds actually expended for the education of handicapped children in the most recent preceding fiscal year for which the information is available. Allowance may be made for:

(i) Decreases in enrollment of handicapped children; and

(ii) Unusually large amounts of funds expended for such long-term purposes as the acquisition of equipment and the construction of school facilities; and

(2) The local educational agency must not use Part B funds to displace State or local funds for any particular cost.

(20 U.S.C. 1414(a)(2)(B))

Comment. Under statutes such as Title I of the Elementary and Secondary Education Act of 1965, as amended, the requirement is to not supplant funds that "would" have been expended if the Federal funds were not available. The requirement under Part B, however, is to not supplant funds which have been "expended." This use of the past tense suggests that the funds referred to are those which the State or local agency actually spent at some time before the use of the Part B funds. Therefore, in judging compliance with this requirement, the Commissioner looks to see if Part B funds are used for any costs which were previously paid for with State or local funds.

The nonsupplanting requirement prohibits a local educational agency from supplanting State and local funds with Part B funds on either an aggregate basis or for a given expenditure. This means that if an LEA spent $100,000 for special education in FY 1977, it must budget at least $100,000 in FY 1978, unless one of the conditions in Reg. 300.230(b)(1) applies.

Whether a local educational agency supplants with respect to a particular cost would depend on the circumstances of the expenditure. For example, if a teacher's salary has been switched from local funding to Part B funding, this would appear to be supplanting. However, if that teacher was taking over a different position (such as a resource room teacher, for example), it would not be supplanting. Moreover, it might be important to consider whether the particular action of a local educational agency led to an increase in services for handicapped children over that which previously existed. The intent of the requirement is to insure that Part B funds are used to increase State and local efforts and are not used to take their place. Compliance would be judged with this aim in mind. The supplanting requirement is not intended to inhibit better services to handicapped children.

Reg. 300.231 Comparable services.

(a) Each application must provide assurance satisfactory to the State educational agency that the local educational agency meets the requirements of this section.

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(b) A local educational agency may not use funds under Part B of the Act to provide services to handicapped children unless the agency uses State and local funds to provide services to those children which, taken as a whole, are at least comparable to services provided to other handicapped children in that local educational agency.

(c) Each local educational agency shall maintain records which show that the agency meets the requirement in paragraph (b) of this section.

(20 U.S.C. 1414(a)(2)(C))

Comment. Under the "comparability" requirement, if State and local funds are used to provide certain services, those services must be provided with State and local funds to all handicapped children in the local educational agency who need them. Part B funds may then be used to supplement existing services, or to provide additional services to meet special needs. This, of course, is subject to the other requirements of the Act, including the priorities under Regs. 300.320-300.324.

Reg. 300.235 Individualized education program.

Each application must include procedures to assure that the local educational agency complies with Regs. 300.340-300.349 of Subpart C.

(20 U.S.C. 1414(a)(5))

Reg. 300.237 Procedural safeguards.

Each application must provide assurance satisfactory to the State educational agency that the local educational agency has procedural safeguards which meet the requirements of Regs. 300.500-300.514 of Subpart E.

(20 U.S.C. 1414(a)(7))

Reg. 300.238 Use of Part B funds.

Each application must describe how the local educational agency will use the funds under Part B of the Act during the next school year.

(20 U.S.C. 1414(a))

Reg. 300.240 Other requirements.

Each local application must include additional procedures and information which the State educational agency may require in order to meet the State annual program plan requirements under Regs. 300.120-300.151.

(20 U.S.C. 1414(a)(6))

APPLICATION FROM SECRETARY OF INTERIOR

Reg. 300.260 Submission of annual application; approval.

In order to receive payments under this part, the Secretary of Interior shall submit an annual application which:

(a) Meets applicable requirements of Section 614(a) of the Act;

(b) Includes monitoring procedures which are consistent with Reg. 300.601; and

(c) Includes other material as agreed to by the Commissioner and the Secretary of Interior.

(20 U.S.C. 1411(f))

Reg. 300.261 Public participation.

In the development of the application for the Department of Interior, the Secretary of Interior shall provide for public participation consistent with Regs. 300.280-300.284.

(20 U.S.C. 1411(f))

Reg. 300.262 Use of Part B funds.

(a) The Department of Interior may use five percent of its payments in any fiscal year, or $200,000, whichever is greater, for administrative costs in carrying out the provisions of this Part.

(b) The remainder of the payments to the Secretary of the Interior in any fiscal year must be used in accordance with the priorities under Regs. 300.320-300.324 of Subpart C.

(20 U.S.C. 1411(f))

Reg. 300.263 Applicable regulations.

The Secretary of the Interior shall comply with the requirements under Subparts C, E, and F.

(20 U.S.C. 1411(f)(2))

PUBLIC PARTICIPATION

Reg. 300.280 Public hearings before adopting an annual program plan.

(a) Prior to its adoption of an annual program plan, the State educational agency shall:

(1) Make the plan available to the general public,

(2) Hold public hearings, and

(3) Provide an opportunity for comment by the general public on the plan.

(20 U.S.C. 1412(7))

Reg. 300.281 Notice.

(a) The State educational agency shall provide notice to the general public of the public hearings.

(b) The notice must be in sufficient detail to inform the public about:

(1) The purpose and scope of the annual program plan and its relation to Part B of the Education of the Handicapped Act,

(2) The availability of the annual program plan,

(3) The date, time, and location of each public hearing,

(4) The procedures for submitting written comments about plan, and

(5) The timetable for developing the final plan and submitting it to the Commissioner for approval.

(c) The notice must be published or announced:

(1) In newspapers or other media, or both, with circulation adequate to notify the general public about the hearings, and (2) Enough in advance of the date of the hearings to afford interested parties throughout the State a reasonable opportunity to participate.

(20 U.S.C. 1412(7))

Reg. 300.282 Opportunity to participate; comment period.

(a) The State educational agency shall conduct the public hearings at times and places that afford interested parties throughout the State a reasonable opportunity to participate.

(b) The plan must be available for comment for a period of at least 30 days following the date of the notice under Reg. 300.281.

(20 U.S.C. 1412(7))

Reg. 300.283 Review of public comments before adopting plan.

Before adopting its annual program plan, the State educational agency shall:

(a) Review and consider all public comments, and

(b) Make any necessary modifications in the plan.

(20 U.S.C. 1412(7))

Reg. 300.284 Publication and availability of approved plan.

After the Commissioner approves an annual program plan, the State educational agency shall give notice in newspapers or other media, or both, that the plan is approved. The notice must name places throughout the State where the plan is available for access by any interested person.

(20 U.S.C. 1412(7))

Subpart C—Services

FREE APPROPRIATE PUBLIC EDUCATION

Reg. 300.300 Timelines for free appropriate public education.

(a) *General.* Each State shall insure that free appropriate public education is available to all handicapped children aged three through eighteen within the State not later than September 1, 1978, and to all handicapped children aged three through twenty-one within the State not later than September 1, 1980.

(b) *Age ranges 3-5 and 18-21.* This paragraph provides rules for applying the requirement in paragraph (a) of this section to handicapped children aged three, four, five, eighteen, nineteen, twenty, and twenty-one:

(1) If State law or a court order requires the State to provide education for handicapped children in any disability category in any of these age groups, the State must make a free appropriate public education available to all handicapped children of the same age who have that disability.

(2) If a public agency provides education to non-handicapped children in any of these age groups, it must make a free appropriate public education available to at least a proportionate number of handicapped children of the same age.

(3) If a public agency provides education to 50 percent or more of its handicapped children in any disability category in any of these age groups, it must make a free appropriate public education available to all of its handicapped children of the same age who have that disability.

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(4) If a public agency provides education to a handicapped child in any of these age groups, it must make a free appropriate public education available to that child and provide that child and his or her parents all of the rights under Part B of the Act and this part.

(5) A State is not required to make a free appropriate public education available to a handicapped child in one of these age groups if:

(i) State law expressly prohibits, or does not authorize, the expenditure of public funds to provide education to non-handicapped children in that age group; or

(ii) The requirement is inconsistent with a court order which governs the provision of free public education to handicapped children in that State.

(20 U.S.C. 1412(2)(B); Sen. Rept. No. 94-168 p. 19 (1975))

Comment. 1. The requirement to make free appropriate public education available applies to all handicapped children within the State who are in the age ranges required under Reg. 300.300 and who need special education and related services. This includes handicapped children already in school and children with less severe handicaps, who are not covered under the priorities under Reg. 300.321.

2. In order to be in compliance with Reg. 300.300, each State must insure that the requirement to identify, locate, and evaluate all handicapped children is fully implemented by public agencies throughout the State. This means that before September 1, 1978, every child who has been referred or is on a waiting list for evaluation (including children in school as well as those not receiving an education) must be evaluated in accordance with Regs. 300.530-300.533 of Subpart E. If, as a result of the evaluation, it is determined that a child needs special education and related services, an individualized education program must be developed for the child by September 1, 1978, and all other applicable requirements of this part must be met.

3. The requirement to identify, locate, and evaluate handicapped children (commonly referred to as the "child find system") was enacted on August 21, 1974, under Pub. L. 93-380. While each State needed time to establish and implement its child find system, the four year period between August 21, 1974, and September 1, 1978, is considered to be sufficient to insure that the system is fully operational and effective on a Statewide basis.

Under the statute, the age range for the child find requirement (0-21) is greater than the mandated age range for providing free appropriate public education (FAPE). One reason for the broader age requirement under "child find" is to enable States to be aware of and plan for younger children who will require special education and related services. It also ties in with the full educational opportunity goal requirement, which has the same age range as child find. Moreover, while a State is not required to provide "FAPE" to handicapped children below the age ranges mandated under Reg. 300.300, the State may, at its discretion, extend services to those children, subject to the requirements on priorities under Regs. 300.320-300.324.

Reg. 300.301 Free appropriate public education—methods and payments.

(a) Each State may use whatever State, local, Federal, and private sources of support are available in the State to meet the requirements of this part. For example, when it is necessary to place a handicapped child in a residential facility, a State could use joint agreements between the agencies involved for sharing the cost of that placement.

(b) Nothing in this part relieves an insurer or similar third party from an otherwise valid obligation to provide or to pay for services provided to a handicapped child.

(20 U.S.C. 1401(18); 1412(2)(B))

Reg. 300.302 Residential placement.

If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

(20 U.S.C. 1412(2)(B); 1413(a)(4)(B))

Comment. This requirement applies to placements which are made by public agencies for educational purposes, and includes placements in State-operated schools for the handicapped, such as a State school for the deaf or blind.

Reg. 300.303 Proper functioning of hearing aids.

Each public agency shall insure that the hearing aids worn by deaf and hard of hearing children in school are functioning properly.

(20 U.S.C. 1412(2)(B))

Comment. The report of the House of Representatives on the 1978 appropriation bill includes the following statement regarding hearing aids:

In its report on the 1976 appropriation bill the Committee expressed concern about the condition of hearing aids worn by children in public schools. A study done at the Committee's direction by the Bureau of Education for the Handicapped reveals that up to one-third of the hearing aids are malfunctioning. Obviously, the Committee expects the Office of Education will ensure that hearing impaired school children are receiving adequate professional assessment, follow-up and services.

(House Report No. 95-381, p. 67 (1977))

g. 300.304 Full educational opportunity goal.

(a) Each State educational agency shall insure that each public agency establishes and implements a goal of providing full educational opportunity to all handicapped children in the area served by the public agency.

(b) Subject to the priority requirements under Regs. 300.320-300.324, a State or local educational agency may use Part B funds to provide facilities, personnel, and services necessary to meet the full educational opportunity goal.

(20 U.S.C. 1412(2)(A); 1414(a)(1)(C))

Comment. In meeting the full educational opportunity goal, the Congress also encouraged local educational agencies to include artistic and cultural activities in programs supported under this part, subject to the priority requirements under Regs. 300.320-300.324. This point is addressed in the following statements from the Senate Report on Pub. L. 94-142:

The use of the arts as a teaching tool for the handicapped has long been recognized as a viable, effective way not only of teaching special skills, but also of reaching youngsters who had otherwise been unteachable. The Committee envisions that programs under this bill could well include an arts component and, indeed, urges that local educational agencies include the arts in programs for the handicapped funded under this Act. Such a program could cover both appreciation of the arts by the handicapped youngsters, and the utilization of the arts as a teaching tool per se.

Museum settings have often been another effective tool in the teaching of handicapped children. For example, the Brooklyn Museum has been a leader in developing exhibits utilizing the heightened tactile sensory skill of the blind. Therefore, in light of the national policy concerning the use of museums in Federally supported education programs enunciated in the Education Amendments of 1974, the Committee also urges local educational agencies to include museums in programs for the handicapped funded under this Act.

(Senate Report No. 94-168, p. 13 (1975))

Reg. 300.305 Program options.

Each public agency shall take steps to insure that its handicapped children have available to them the variety of educational programs and services available to nonhandicapped children in the area served by the agency, including art, music, industrial arts, consumer and homemaking education, and vocational education.

(20 U.S.C. 1412(2)(A); 1414(a)(1)(C))

Comment. The above list of program options is not exhaustive, and could include any program or activity in which nonhandicapped students participate. Moreover, vocational education programs must be specially designed if necessary to enable a handicapped student to benefit fully from those programs; and the set-aside funds under the Vocational Education Act of 1963, as amended by Pub. L. 94-482, may be used for this purpose. Part B funds may also be used, subject to the priority requirements under Regs. 300.320-300.324.

Reg. 300.306 Nonacademic services.

(a) Each public agency shall take steps to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped children an equal opportunity for participation in those services and activities.

(b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the public agency and assistance in making outside employment available.

(20 U.S.C. 1412(2)(A); 1414(a)(1)(C))

Reg. 300.307 Physical education.

(a) *General.* Physical education services, specially designed if necessary, must be made available to every handicapped child receiving a free appropriate public education.

(b) *Regular physical education.* Each handicapped child must be afforded the opportunity to participate in the regular physical education program available to nonhandicapped children unless:

(1) The child is enrolled full time in a separate facility; or

(2) The child needs specially designed physical education, as prescribed in the child's individualized education program.

(c) *Special physical education.* If specially designed physical education is prescribed in a child's individualized education program, the public agency responsible for the education of that child shall provide the services directly, or make arrangements for it to be provided through other public or private programs.

(d) *Education in separate facilities.* The public agency responsible for the education of a handicapped child who is enrolled in a separate facility shall insure that the child receives appropriate physical education services in compliance with paragraphs (a) and (c) of this section.

(20 U.S.C. 1401(16); 1412(5)(B); 1414(a)(6))

Comment. The Report of the House of Representatives on Pub. L. 94-142 includes the following statement regarding physical education:

Special education as set forth in the Committee bill includes instruction in physical education, which is provided as a matter of course to all nonhandicapped children enrolled in public elementary and secondary schools. The Committee is concerned that although these services are available to and required of all children in our school systems, they are often viewed as a luxury for handicapped children.

* * *

The Committee expects the Commissioner of Education to take whatever action is necessary to assure that physical education ser-

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vices are available to all handicapped children, and has specifically included physical education within the definition of special education to make clear that the Committee expects such services, specially designed where necessary, to be provided as an integral part of the educational program of every handicapped child.

(House Report No. 94-332, p. 9 (1975))

PRIORITIES IN THE USE OF PART B FUNDS

Reg. 300.320 Definitions of "first priority children" and "second priority children."

For the purposes of Regs. 300.321-300.324, the term:

(a) "First priority children" means handicapped children who:

(1) Are in an age group for which the State must make available free appropriate public education under Reg. 300.300; and

(2) Are not receiving any education.

(b) "Second priority children" means handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education.

(20 U.S.C. 1412(3))

Comment. After September 1, 1978, there should be no second priority children, since States must insure, as a condition of receiving Part B funds for fiscal year 1979, that all handicapped children will have available a free appropriate public education by that date.

NOTE—The term "free appropriate public education," as defined in Reg. 300.4 of Subpart A, means "special education and related services which * * * are provided in conformity with an individualized education program. * * *."

New "First priority children" will continue to be found by the State after September 1, 1978 through on-going efforts to identify, locate, and evaluate all handicapped children.

Reg. 300.321 Priorities.

(a) Each State and local educational agency shall use funds provided under Part B of the Act in the following order of priorities:

(1) To provide free appropriate public education to first priority children, including the identification, location, and evaluation of first priority children.

(2) To provide free appropriate public education to second priority children, including the identification, location, and evaluation of second priority children.

(3) To meet the other requirements in this part.

(b) The requirements of paragraph (a) of this section do not apply to funds which the State uses for administration under Reg. 300.620

(20 U.S.C. 1411 (b)(1)(B), (b)(2)(B), (c)(1)(B), (c)(2)(A)(ii))

(c) State and local educational agencies may not use funds under Part B of the Act for preservice training.

(20 U.S.C. 1413(a)(3); Senate Report No. 94-168, p. 34 (1975))

Comment. Note that a State educational agency as well as local educational agencies must use Part B funds (except the portion used for State administration) for the priorities. A State may have to set aside a portion of its Part B allotment to be able to serve newly identified first priority children.

After September 1, 1978, Part B funds may be used:

(1) To continue supporting child identification, location, and evaluation activities;

(2) To provide free appropriate public education to newly identified first priority children;

(3) To meet the full educational opportunities goal required under § 300.304, including employing additional personnel and providing in-service training, in order to increase the level, intensity and quality of services provided to individual handicapped children; and

(4) To meet the other requirements of Part B.

Reg. 300.322 First priority children—school year 1977-1978.

(a) In school year 1977-1978, if a major component of a first priority child's proposed educational program is not available (for example, there is no qualified teacher), the public agency responsible for the child's education shall:

(1) Provide an interim program of services for the child; and

(2) Develop an individualized education program for full implementation no later than September 1, 1978.

(b) A local educational agency may use Part B funds for training or other support services in school year 1977-1978 only if all of its first priority children have available to them at least an interim program of services.

(c) A State educational agency may use Part B funds for training or other support services in school year 1977-1978 only if all first priority children in the State have available to them at least an interim program of services.

(20 U.S.C. 1411(b), (c))

Comment. This provision is intended to make it clear that a State or local educational agency may not delay placing a previously unserved (first priority) child until it has, for example, implemented an in-service training program. The child must be placed. After the child is in at least an interim program, the State or local educational agency may use Part B funds for training or other support services needed to provide that child with a free appropriate public education.

Reg. 300.323 Services to other children.

If a State or a local educational agency is providing free appropriate public education to all its first priority children, that State or agency may use funds provided under Part B of the Act:

(a) To provide free appropriate public education to handicapped children who are not receiving any education and who are in the age groups not covered under Reg. 300.300 in that State; or

(b) To provide free appropriate public education to second priority children; or

(c) Both.

(20 U.S.C. 1411(b)(1)(B), (b)(2)(B), (c)(2)(A)(ii))

Reg. 300.324 Application of local educational agency to use funds for the second priority.

A local educational agency may use funds provided under Part B of the Act for second priority children, if it provides assurance satisfactory to the State educational agency in its application (or an amendment to its application):

(a) That all first priority children have a free appropriate public education available to them;

(b) That the local educational agency has a system for the identification, location, and evaluation of handicapped children, as described in its application; and

(c) That whenever a first priority child is identified, located, and evaluated, the local educational agency makes available a free appropriate public education to the child.

(20 U.S.C. 1411(b)(1)(B), (c)(1)(B); 1414(a)(1)(C)(ii))

INDIVIDUALIZED EDUCATION PROGRAMS

Reg. 300.340 Definition.

As used in this part, the term "individualized education program" means a written statement for a handicapped child that is developed and implemented in accordance with Regs. 300.341-300.349.

(20 U.S.C. 1401(19))

Reg. 300.341 State educational agency responsibility.

(a) *Public agencies.* The State educational agency shall insure that each public agency develops and implements an individualized education program for each of its handicapped children.

(b) *Private schools and facilities.* The State educational agency shall insure that an individualized education program is developed and implemented for each handicapped child who:

(1) Is placed in or referred to a private school or facility by a public agency; or

(2) Is enrolled in a parochial or other private school and receives special education or related services from a public agency.

(20 U.S.C. 1412(4), (6); 1413(a)(4))

Comment. This section applies to all public agencies, including other State agencies (e.g., departments of mental health and welfare), which provide special education to a handicapped child either directly, by contract or through other arrangements. Thus, if a State welfare agency contracts with a private school or facility to provide special education to a handicapped child, that agency would be responsible for insuring that an individualized education program is developed for the child.

Reg. 300.342 When individualized education programs must be in effect.

(a) On October 1, 1977, and at the beginning of each school year thereafter, each public agency shall have in effect an individualized education program for every handicapped child who is receiving special education from that agency.

(b) An individualized education program must:

(1) Be in effect before special education and related services are provided to a child; and

(2) Be implemented as soon as possible following the meetings under Reg. 300.343.

(20 U.S.C. 1412 (2)(B), (4), (6); 1414(a)(5); Publ. L. 94-142, Sec. 8(c) (1975))

Comment. Under paragraph (b)(2), it is expected that a handicapped child's individualized education program (IEP) will be implemented immediately following the meetings under Reg. 300.343. An exception to this would be (1) when the meetings occur during the summer or a vacation period, or (2) where there are circumstances which require a short delay (e.g., working out transportation arrangements). However, there can be no undue delay in providing special education and related services to the child.

Reg. 300.343 Meetings.

(a) *General.* Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising a handicapped child's individualized education program.

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(b) *Handicapped children currently served.* If the public agency has determined that a handicapped child will receive special education during school year 1977-1978, a meeting must be held early enough to insure that an individualized education program is developed by October 1, 1977.

(c) *Other handicapped children.* For a handicapped child who is not included under paragraph (b) of this section, a meeting must be held within thirty calendar days of a determination that the child needs special education and related services.

(d) *Review.* Each public agency shall initiate and conduct meetings to periodically review each child's individualized education program and if appropriate revise its provisions. A meeting must be held for this purpose at least once a year.

(20 U.S.C. 1412(2)(B), (4), (6); 1414(a)(5))

Comment. The dates on which agencies must have individualized education programs (IEPs) in effect are specified in Reg. 300.342 (October 1, 1977, and the beginning of each school year thereafter). However, except for new handicapped children (i.e., those evaluated and determined to need special education after October 1, 1977), the timing of meetings to develop, review, and revise IEPs is left to the discretion of each agency.

In order to have IEPs in effect by the dates in Reg. 300.342, agencies could hold meetings at the end of the school year or during the summer preceding those dates. In meeting the October 1, 1977 timeline, meetings could be conducted up through the October 1 date. Thereafter, meetings may be held any time throughout the year, as long as IEPs are in effect at the beginning of each school year.

The statute requires agencies to hold a meeting at least once each year in order to review, and if appropriate revise, each child's IEP. The timing of those meetings could be on the anniversary date of the last IEP meeting on the child, but this is left to the discretion of the agency.

Reg. 300.344 Participants in meetings.

(a) *General.* The public agency shall insure that each meeting includes the following participants:

(1) A representative of the public agency, other than the child's teacher, who is qualified to provide, or supervise the provision of, special education.

(2) The child's teacher.

(3) One or both of the child's parents, subject to Reg. 300.345.

(4) The child, where appropriate.

(5) Other individuals at the discretion of the parent or agency.

(b) *Evaluation personnel.* For a handicapped child who has been evaluated for the first time, the public agency shall insure:

(1) That a member of the evaluation team participates in the meeting; or

(2) That the representative of the public agency, the child's teacher, or some other person is present at the meeting, who is knowledgeable about the evaluation procedures used with the child and is familiar with the results of the evaluation.

(20 U.S.C. 1401(19); 1412(2)(B), (4), (6); 1414(a)(5))

Comment. 1. In deciding which teacher will participate in meetings on a child's individualized education program, the agency may wish to consider the following possibilities:

(a) For a handicapped child who is receiving special education, the "teacher" could be the child's special education teacher. If the child's handicap is a speech impairment, the "teacher" could be the speech-language pathologist.

(b) For a handicapped child who is being considered for placement in special education, the "teacher" could be the child's regular teacher, or a teacher qualified to provide education in the type of program in which the child may be placed, or both.

(c) If the child is not in school or has more than one teacher, the agency may designate which teacher will participate in the meeting.

2. Either the teacher or the agency representative should be qualified in the area of the child's suspected disability.

3. For a child whose primary handicap is a speech impairment, the evaluation personnel participating under paragraph (b)(1) of this section would normally be the speech-language pathologist.

Reg. 300.345 Parent participation.

(a) Each public agency shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate, including:

(1) Notifying parents of the meeting early enough to insure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

(b) The notice under paragraph (a)(1) of this section must indicate the purpose, time, and location of the meeting, and who will be in attendance.

(c) If neither parent can attend, the public agency shall use other methods to insure parent participation, including individual or conference telephone calls.

(d) A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case the public agency

ust have a record of its attempts to arrange a mutually greed on time and place such as:

(1) Detailed records of telephone calls made or attempted and the results of those calls.

(2) Copies of correspondence sent to the parents and any responses received, and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) The public agency shall take whatever action is necessary to insure that the parent understands the proceedings at a meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than English.

(f) The public agency shall give the parent, on request, a copy of the individualized education program.

(20 U.S.C. 1401(19); 1412(2)(B), (4), (6); 1414(a)(5))

Comment. The notice in paragraph (a) could also inform parents that they may bring other people to the meeting. As indicated in paragraph (c), the procedure used to notify parents (whether oral or written or both) is left to the discretion of the agency, but the agency must keep a record of its efforts to contact parents.

Reg. 300.346 Content of individualized education program.

The individualized education program for each child must include:

(a) A statement of the child's present levels of educational rformance;

(b) A statement of annual goals, including short term instructional objectives;

(c) A statement of the specific special education and related services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs;

(d) The projected dates for initiation of services and the anticipated duration of the services; and

(e) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.

(20 U.S.C. 1401(19); 1412 (2)(B), (4), (6); 1414(a)(5); Senate Report No. 94-168, p. 11 (1975))

Reg. 300.347 Private school placements.

(a) *Developing individualized education programs.* (1) Before a public agency places a handicapped child in, or refers a child to, a private school or facility, the agency shall initiate and conduct a meeting to develop an individualized education program for the child in accordance with Reg. 300.343.

(2) The agency shall insure that a representative of the private school facility attends the meeting. If the representative cannot attend, the agency shall use other methods to insure participation by the private school or facility, including individual or conference telephone calls.

(3) The public agency shall also develop an individualized education program for each handicapped child who was placed in a private school or facility by the agency before the effective date of these regulations.

(b) *Reviewing and revising individualized education programs.* (1) After a handicapped child enters a private school or facility, any meetings to review and revise the child's individualized education program may be initiated and conducted by the private school or facility at the discretion of the public agency.

(2) If the private school or facility initiates and conducts these meetings, the public agency shall insure that the parents and an agency representative:

(i) Are involved in any decision about the child's individualized education program; and

(ii) Agree to any proposed changes in the program before those changes are implemented.

(c) *Responsibility.* Even if a private school or facility implements a child's individualized education program, responsibility for compliance with this part remains with the public agency and the State educational agency.

(20 U.S.C. 1413(a)(4)(B))

Reg. 300.348 Handicapped children in parochial or other private schools.

If a handicapped child is enrolled in a parochial or other private school and receives special education or related services from a public agency, the public agency shall:

(a) Initiate and conduct meetings to develop, review, and revise an individualized education program for the child, in accordance with Reg. 300.343; and

(b) Insure that a representative of the parochial or other private school attends each meeting. If the representative cannot attend, the agency shall use other methods to insure participation by the private school, including individual or conference telephone calls.

(20 U.S.C. 1413(a)(4)(A))

Reg. 300.349 Individualized education program—accountability.

Each public agency must provide special education and related services to a handicapped child in accordance with an individualized education program. However, Part B of the

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Act does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and objectives.

(20 U.S.C. 1412(2)(B); 1414(a)(5), (6); Cong. Rec. at H7152 (daily ed., July 21, 1975))

Comment. This section is intended to relieve concerns that the individualized education program constitutes a guarantee by the public agency and the teacher that a child will progress at a specified rate. However, this section does not relieve agencies and teachers from making good faith efforts to assist the child in achieving the objectives and goals listed in the individualized education program. Further, the section does not limit a parent's right to complain and ask for revisions of the child's program, or to invoke due process procedures, if the parent feels that these efforts are not being made.

DIRECT SERVICE BY THE STATE EDUCATIONAL AGENCY

Reg. 300.360 Use of local educational agency allocation for direct services.

(a) A State educational agency may not distribute funds to a local educational agency, and shall use those funds to insure the provision of a free appropriate public education to handicapped children residing in the area served by the local educational agency, if the local educational agency, in any fiscal year:

(1) Is entitled to less than $7,500 for that fiscal year (beginning with fiscal year 1979);

(2) Does not submit an application that meets the requirements of Regs. 300.220-300.240;

(3) Is unable or unwilling to establish and maintain programs of free appropriate public education;

(4) Is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain those programs; or

(5) Has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of those children.

(b) In meeting the requirements of paragraph (a) of this section, the State educational agency may provide special education and related services directly, by contract, or through other arrangements.

(c) The excess cost requirements under Regs. 300.182-300.186 do not apply to the State educational agency.

(20 U.S.C. 1411(c)(4); 1413(b); 1414(d))

Comment. Section 300.360 is a combination of three provisions in the statute (Sections 611(c)(4), 613(b), and 614(d)). This section focuses mainly on the State's administration and use of local entitlements under Part B.

The State educational agency, as a recipient of Part B funds is responsible for insuring that all public agencies in the State comply with the provisions of the Act, regardless of whether they receive Part B funds. If a local educational agency elects not to apply for its Part B entitlement, the State would be required to use those funds to insure that a free appropriate public education (FAPE) is made available to children residing in the area served by that local agency. However, if the local entitlement is not sufficient for this purpose, additional State or local funds would have to be expended in order to insure that "FAPE" and the other requirements of the Act are met.

Moreover, if the local educational agency is the recipient of any other Federal funds, it would have to be in compliance with Subpart D of the regulations for section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84). It should be noted that the term "FAPE" has different meanings under Part B and section 504. For example, under Part B, "FAPE" is a statutory term which requires special education and related services to be provided in accordance with an individualized education program (IEP). However, under section 504, each recipient must provide an education which includes services that are "designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met * * * " Those regulations state that implementation of an IEP, in accordance with Part B, is one means of meeting the "FAPE" requirement.

Reg. 300.361 Nature and location of services.

The State educational agency may provide special education and related services under Reg. 300.360(a) in the manner and at the location it considers appropriate. However, the manner in which the education and services are provided must be consistent with the requirements of this part (including the least restrictive environment provision in Regs. 300.550-300.556 of Subpart E).

(20 U.S.C. 1414(d))

Reg. 300.370 Use of State educational agency allocation for direct and support services.

(a) The State shall use the portion of its allocation it does not use for administration to provide support services and direct services in accordance with the priority requirements under Regs. 300.320-300.324.

(b) For the purposes of paragraph (a) of this section:

(1) "Direct services" means services provided to a handicapped child by the State directly, by contract, or through other arrangements.

(2) "Support services" includes implementing the comprehensive system of personnel development under Regs. 300.380-300.388, recruitment and training of hearing officers and surrogate parents, and public information and parent training activities relating to a free appropriate public education for handicapped children.

(20 U.S.C. 1411(b)(2), (c)(2))

Reg. 300.371 State matching.

Beginning with the period July 1, 1978-June 30, 1979, and for each following year, the funds that a State uses for direct and support services under Reg. 300.370 must be matched on a program basis by the State from funds other than Federal funds. This requirement does not apply to funds that the State uses under Reg. 300.360.

(20 U.S.C. 1411(c)(2)(B), (c)(4)(B))

Comment. The requirement in Reg. 300.371 would be satisfied if the State can document that the amount of State funds expended for each major program area (e.g., the comprehensive system of personnel development) is at least equal to the expenditure of Federal funds in that program area.

Reg. 300.372 Applicability of nonsupplanting requirement.

Beginning with funds appropriated for Fiscal Year 1979 and for each following Fiscal Year, the requirement in section 613(a)(9) of the Act, which prohibits supplanting with Federal funds, does not apply to funds that the State uses from its allocation under Reg. 300.706(a) of Subpart G for administration, direct services, or support services.

(20 U.S.C. 1411(c)(3))

COMPREHENSIVE SYSTEM OF PERSONNEL DEVELOPMENT

Reg. 300.380 Scope of system.

Each annual program plan must include a description of programs and procedures for the development and implementation of a comprehensive system of personnel development which includes:

(a) The inservice training of general and special educational instructional, related services, and support personnel;

(b) Procedures to insure that all personnel necessary to carry out the purposes of the Act are qualified (as defined in Reg. 300.12 of Subpart A) and that activities sufficient to carry out this personnel development plan are scheduled; and

(c) Effective procedures for acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and for adopting, where appropriate, promising educational practices and materials developed through those projects.

(20 U.S.C. 1413(a)(3))

Reg. 300.381 Participation of other agencies and institutions.

(a) The State educational agency must insure that all public and private institutions of higher education, and other agencies and organizations (including representatives of handicapped, parent, and other advocacy organizations) in the state which have an interest in the preparation of personnel for the education of handicapped children, have an opportunity to participate fully in the development, review, and annual updating of the comprehensive system of personnel development.

(b) The annual program plan must describe the nature and extent of participation under paragraph (a) of this section and must describe responsibilities of the State educational agency, local educational agencies, public and private institutions of higher education, and other agencies:

(1) With respect to the comprehensive system as a whole, and

(2) With respect to the personnel development plan under Reg. 300.383.

(20 U.S.C. 1412(7)(A); 1413(a)(3))

Reg. 300.382 Inservice training.

(a) As used in this section, "inservice training" means any training other than that received by an individual in a full-time program which leads to a degree.

(b) Each annual program plan must provide that the State educational agency:

(1) Conducts an annual needs assessment to determine if a sufficient number of qualified personnel are available in the State; and

(2) Initiates inservice personnel development programs based on the assessed needs of Statewide significance related to the implementation of the Act.

(c) Each annual program plan must include the results of the needs assessment under paragraph (b)(1) of this section, broken out by need for new personnel and need for retrained personnel.

(d) The State educational agency may enter into contracts with institutions of higher education, local educational agencies or other agencies, institutions, or organizations (which may include parent, handicapped, or other advocacy organizations), to carry out:

(1) Experimental or innovative personnel development programs;

(2) Development or modification of instructional materials; and

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(3) Dissemination of significant information derived from educational research and demonstration projects.

(e) Each annual program plan must provide that the State educational agency insures that ongoing inservice training programs are available to all personnel who are engaged in the education of handicapped children, and that these programs include:

(1) The use of incentives which insure participation by teachers (such as released time, payment for participation, options for academic credit, salary step credit, certification renewal, or updating professional skills);

(2) The involvement of local staff; and

(3) The use of innovative practices which have been found to be effective.

(f) Each annual program plan must:

(1) Describe the process used in determining the inservice training needs of personnel engaged in the education of handicapped children;

(2) Identify the areas in which training is needed (such as individualized education programs, non-discriminatory testing, least restrictive environment, procedural safeguards, and surrogate parents);

(3) Specify the groups requiring training (such as special teachers, regular teachers, administrators, psychologists, speech-language pathologists, audiologists, physical education teachers, therapeutic recreation specialists, physical therapists, occupational therapists, medical personnel, parents, volunteers, hearing officers, and surrogate parents);

(4) Describe the content and nature of training for each area under paragraph (f)(2) of this section;

(5) Describe how the training will be provided in terms of (i) geographical scope (such as Statewide, regional, or local), and (ii) staff training source (such as college and university staffs, State and local educational agency personnel, and non-agency personnel);

(6) Specify: (i) The funding sources to be used, and

(ii) The time frame for providing it; and

(7) Specify procedures for effective evaluation of the extent to which program objectives are met.

(20 U.S.C. 1413(a)(3))

Reg. 300.383 Personnel development plan.

Each annual program plan must: (a) Include a personnel development plan which provides a structure for personnel planning and focuses on preservice and in-service education needs;

(b) Describe the results of the needs assessment under Reg 300.382(b)(1) with respect to identifying needed areas of training, and assigning priorities to those areas; and

(c) Identify the target populations for personnel development, including general education and special education instructional and administrative personnel, support personnel, and other personnel (such as paraprofessionals, parents, surrogate parents, and volunteers).

(20 U.S.C. 1413(a)(3))

Reg. 300.384 Dissemination.

(a) Each annual program plan must include a description of the State's procedures for acquiring, reviewing, and disseminating to general and special educational instructional and support personnel, administrators of programs for handicapped children, and other interested agencies and organizations (including parent, handicapped, and other advocacy organizations) significant information and promising practices derived from educational research, demonstration, and other projects.

(b) Dissemination includes:

(1) Making those personnel, administrators, agencies and organizations aware of the information and practices;

(2) Training designed to enable the establishment of innovative programs and practices targeted on identified local needs; and

(3) Use of instructional materials and other media for personnel development and instructional programming.

(20 U.S.C. 1413(a)(3))

Reg. 300.385 Adoption of educational practices.

(a) Each annual program must provide for a statewide system designed to adopt, where appropriate, promising educational practices and materials proven effective through research and demonstration.

(b) Each annual program plan must provide for thorough reassessment of educational practices used in the State.

(c) Each annual program plan must provide for the identification of State, local, and regional resources (human and material) which will assist in meeting the State's personnel preparation needs.

(20 U.S.C. 1413(a)(3))

Reg. 300.387 Technical assistance to local educational agencies.

Each annual program plan must include a description of technical assistance that the State educational agency gives to local educational agencies in their implementation of the State's comprehensive system of personnel development.

(20 U.S.C. 1413(a)(3))

Subpart D—Private Schools

HANDICAPPED CHILDREN IN PRIVATE SCHOOLS PLACED OR REFERRED BY PUBLIC AGENCIES

Reg. 300.400 Applicability of Regs. 300.401-300.403.

Regs. 300.401-300.403 apply only to handicapped children who are or have been placed in or referred to a private school or facility by a public agency as a means of providing special education and related services.

(20 U.S.C. 1413(a)(4)(B))

g. 300.401 Responsibility of State educational agency.

Each State educational agency shall insure that a handicapped child who is placed in or referred to a private school or facility by a public agency:

(a) Is provided special education and related services:

(1) In conformance with an individualized educational program which meets the requirements under Regs. 300.340-300.349 of Subpart C;

(2) At no cost to the parents; and

(3) At a school or facility which meets the standards that apply to State and local educational agencies (including the requirements in this part); and

(b) Has all of the rights of a handicapped child who is served by a public agency.

(20 U.S.C. 1413(a)(4)(B))

Reg. 300.402 Implementation by State educational agency.

In implementing Reg. 300.401, the State educational agency shall:

(a) Monitor compliance through procedures such as written reports, on-site visits, and parent questionnaires:

(b) Disseminate copies of applicable standards to each private school and facility to which a public agency has referred or placed a handicapped child; and

(c) Provide an opportunity for those private schools and facilities to participate in the development and revision of State standards which apply to them.

(20 U.S.C. 1413(a)(4)(B))

Reg. 121a.403 Placement of children by parents.

(a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under Regs. 300.450-300.460.

(b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures under Regs. 300.500-300.514 of Subpart E.

(20 U.S.C. 1412(2)(B); 1415)

HANDICAPPED CHILDREN IN PRIVATE SCHOOLS NOT PLACED OR REFERRED BY PUBLIC AGENCIES

Reg. 300.450 Definition of "private school handicapped children."

As used in Regs. 300.451-300.452, "private school handicapped children" means handicapped children enrolled in private schools or facilities other than handicapped children covered under Regs. 300.400-300.403.

(20 U.S.C. 1413(a)(4)(A))

[Amended in 45 Fed. Reg. 22531 (April 3, 1980).]

Reg. 300.451 State educational agency responsibility.

The State educational agency shall insure that—

(a) To the extent consistent with their number and location in the State, provision is made for the participation of private school handicapped children in the program assisted or carried out under this part by providing them with special education and related services; and

(b) The other requirements in 34 CFR 76.651-76.663 of EDGAR are met.

(20 U.S.C. 1413(a)(4)(A))

[Amended in 45 Fed. Reg. 22531 (April 3, 1980).]

Reg. 300.452 Local educational agency responsibility.

(a) Each local educational agency shall provide special education and related services designed to meet the needs of private school handicapped children residing in the jurisdiction of the agency.

(20 U.S.C. 1413(a)(4)(A); 1414(a)(6))

[Amended in 45 Fed. Reg. 22531 (April 3, 1980).]

Subpart E—Procedural Safeguards

DUE PROCESS PROCEDURES FOR PARENTS AND CHILDREN

Reg. 300.500 Definitions of "consent," "evaluation," and "personally identifiable."

As used in this part: "Consent" means that: (a) The parent has been fully informed of all information relevant to

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the activity for which consent is sought, in his or her native language, or other mode of communication;

(b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) which will be released and to whom; and

(c) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

"Evaluation" means procedures used in accordance with Regs. 300.530-300.534 to determine whether a child is handicapped and the nature and extent of the special education and related services that the child needs. The term means procedures used selectively with an individual child and does not include basic tests administered to or procedures used with all children in a school, grade, or class.

"Personally identifiable" means that information includes:

(a) The name of the child, the child's parent, or other family member;

(b) The address of the child;

(c) A personal identifier, such as the child's social security number or student number; or

(d) A list of personal characteristics or other information which would make it possible to identify the child with reasonable certainty.

(20 U.S.C. 1415, 1417(c))

Reg. 300.501 General responsibility of public agencies.

Each State educational agency shall insure that each public agency establishes and implements procedural safeguards which meet the requirements of Regs. 300.500-300.514.

(20 U.S.C. 1415(a))

Reg. 300.502 Opportunity to examine records.

The parents of a handicapped child shall be afforded, in accordance with the procedures in Regs. 300.562-300.569 an opportunity to inspect and review all education records with respect to:

(a) The identification, evaluation, and educational placement of the child, and

(b) The provision of a free appropriate public education to the child.

(20 U.S.C. 1415(b)(1)(A))

Reg. 300.503 Independent educational evaluation.

(a) *General.* (1) The parents of a handicapped child have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) Each public agency shall provide to parents, on request, information about where an independent educational evaluation may be obtained.

(3) For the purposes of this part:

(i) "Independent educational evaluation" means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.

(ii) "Public expense" means that the public agency either pays for the full cost of the evaluation or insures that the evaluation is otherwise provided at no cost to the parent, consistent with Reg. 300.301 of Subpart C.

(b) *Parent right to evaluation at public expense.* A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. However, the public agency may initiate a hearing under Reg. 300.506 of this subpart to show that its evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(c) *Parent initiated evaluations.* If the parent obtains an independent educational evaluation at private expense, the results of the evaluation:

(1) Must be considered by the public agency in any decision made with respect to the provision of a free appropriate public education to the child, and

(2) May be presented as evidence at a hearing under this subpart regarding that child.

(d) *Requests for evaluations by hearing officers.* If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

(e) *Agency criteria.* Whenever an independent evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria which the public agency uses when it initiates an evaluation.

(20 U.S.C. 1415(b)(1)(A))

Reg. 300.504 Prior notice; parent consent.

(a) *Notice.* Written notice which meets the requirements under Reg. 300.505 must be given to the parents of a handicapped child a reasonable time before the public agency:

(1) Proposes to initiate or change the identification, aluation, or educational placement of the child or the provision of a free appropriate public education to the child, or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child.

(b) *Consent*. (1) Parental consent must be obtained before:

(i) Conducting a preplacement evaluation; and

(ii) Initial placement of a handicapped child in a program providing special education and related services.

(2) Except for preplacement evaluation and initial placement, consent may not be required as a condition of any benefit to the parent or child.

(c) *Procedures where parent refuses consent*. (1) Where State law requires parental consent before a handicapped child is evaluated or initially provided special education and related services, State procedures govern the public agency in overriding a parent's refusal to consent.

(2)(i) Where there is no State law requiring consent before a handicapped child is evaluated or initially provided special education and related services, the public agency may use the hearing procedures in Regs. 300.506-300.508 to determine if the child may be evaluated or initially provided special education and related services without parental consent.

(ii) If the hearing officer upholds the agency, the agency may evaluate or initially provide special education and related services to the child without the parent's consent, subject to the parent's rights under Regs. 300.510-300.513.

(20 U.S.C. 1415(b)(1)(C), (D))

Comment. 1. Any changes in a child's special education program, after the initial placement, are not subject to parental consent under Part B, but are subject to the prior notice requirement in paragraph (a) and the individualized education program requirements in Subpart C.

2. Paragraph (c) means that where State law requires parental consent before evaluation or before special education and related services are initially provided, and the parent refuses (or otherwise withholds) consent, State procedures, such as obtaining a court order authorizing the public agency to conduct the evaluation or provide the education and related services, must be followed.

If, however, there is no legal requirement for consent outside of these regulations, the public agency may use the due process procedures under this subpart to obtain a decision to allow the evaluation or services without parental consent. The agency must notify the parent of its actions, and the parent has appeal rights as well as rights at the hearing itself.

Reg. 300.505 Content of notice.

(a) The notice under Reg. 300.504 must include:

(1) A full explanation of all of the procedural safeguards available to the parents under Subpart E;

(2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected;

(3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and

(4) A description of any other factors which are relevant to the agency's proposal or refusal.

(b) The notice must be:

(1) Written in language understandable to the general public, and

(2) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(c) If the native language or other mode of communication of the parent is not a written language, the State or local educational agency shall take steps to insure:

(1) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(2) That the parent understands the content of the notice, and

(3) That there is written evidence that the requirements in paragraph (c) (1) and (2) of this section have been met.

(20 U.S.C. 1415(b)(1)(D))

Reg. 300.506 Impartial due process hearing.

(a) A parent or a public educational agency may initiate a hearing on any of the matters described in Reg. 300.504(a)(1) and (2).

(b) The hearing must be conducted by the State educational agency or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the State educational agency.

(c) The public agency shall inform the parent of any free or low-cost legal and other relevant services available in the area if:

(1) The parent requests the information; or

(2) The parent or the agency initiates a hearing under this section.

(20 U.S.C. 1416(b)(2))

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Comment. Many States have pointed to the success of using mediation as an intervening step prior to conducting a formal due process hearing. Although the process of mediation is not required by the statute or these regulations, an agency may wish to suggest mediation in disputes concerning the identification, evaluation, and educational placement of handicapped children, and the provision of a free appropriate public education to those children. Mediations have been conducted by members of State educational agencies or local educational agency personnel who were not previously involved in the particular case. In many cases, mediation leads to resolution of differences between parents and agencies without the development of an adversarial relationship and with minimal emotional stress. However, mediation may not be used to deny or delay a parent's rights under this subpart.

Reg. 300.507 Impartial hearing officer.

(a) A hearing may not be conducted:

(1) By a person who is an employee of a public agency which is involved in the education or care of the child, or

(2) By any person having a personal or professional interest which would conflict with his or her objectivity in the hearing.

(b) A person who otherwise qualifies to conduct a hearing under paragraph (a) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.

(c) Each public agency shall keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

(20 U.S.C. 1414(b)(2))

Reg. 300.508 Hearing rights.

(a) Any party to a hearing has the right to:

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children;

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five days before the hearing.

(4) Obtain a written or electronic verbatim record of the hearing;

(5) Obtain written findings of fact and decisions. (The public agency shall transmit those findings and decisions, after deleting any personally identifiable information, to the State advisory panel established under Subpart F).

(b) Parents involved in hearings must be given the right to:

(1) Have the child who is the subject of the hearing present; and

(2) Open the hearing to the public.

(20 U.S.C. 1415(d))

Reg. 300.509 Hearing decision; appeal.

A decision made in a hearing conducted under this subpart is final, unless a party to the hearing appeals the decision under Reg. 300.510 or Reg. 300.511.

Reg. 300.510 Administrative appeal; impartial review.

(a) If the hearing is conducted by a public agency other than the State educational agency, any party aggrieved by the findings and decision in the hearing may appeal to the State educational agency.

(b) If there is an appeal, the State educational agency shall conduct an impartial review of the hearing. The official conducting the review shall:

(1) Examine the entire hearing record;

(2) Ensure that the procedures at the hearing were consistent with the requirements of due process;

(3) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in Reg. 300.508 apply;

(4) Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official;

(5) Make an independent decision on completion of the review; and

(6) Give a copy of written findings and the decision to the parties.

(c) The decision made by the reviewing official is final, unless a party brings a civil action under Reg. 300.512.

(20 U.S.C. 1415(c), (d); H.Rep. No. 94-664, at p. 49 (1975))

Comment. 1. The State educational agency may conduct its review either directly or through another State agency acting on its behalf. However, the State educational agency remains responsible for the final decision on review.

2. All parties have the right to continue to be represented by counsel at the State administrative review level, whether or not the reviewing official determines that a further hearing is necessary. If the reviewing official decides to hold a hearing to receive additional evidence, the other rights in Reg. 300.508, relating to hearings, also apply.

Reg. 300.511 Civil action.

Any party aggrieved by the findings and decision made in a hearing who does not have the right to appeal under Reg. 300.510 of this subpart, and any party aggrieved by the decision of a reviewing officer under Reg. 300.510 has the right to bring a civil action under Section 615(e)(2) of the Act.

(20 U.S.C. 1415)

Reg. 300.512 Timeliness and convenience of hearings and reviews.

(a) The public agency shall insure that not later than 45 days after the receipt of a request for a hearing:

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The State educational agency shall insure that not later than 30 days after the receipt of a request for a review:

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place which is reasonably convenient to the parents and child involved.

(20 U.S.C. 1415)

Reg. 300.513 Child's status during proceedings.

(a) During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school program until the completion of all the proceedings.

(20 U.S.C. 1415(e)(3))

Comment. Reg. 300.513 does not permit a child's placement to be changed during a complaint proceeding, unless the parents and agency agree otherwise. While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.

Reg. 300.514 Surrogate parents.

(a) *General*. Each public agency shall insure that the rights of a child are protected when:

(1) No parent (as defined in Reg. 300.10) can be identified;

(2) The public agency, after reasonable efforts, cannot discover the whereabouts of a parent; or

(3) The child is a ward of the State under the laws of that State.

(b) *Duty of public agency*. The duty of a public agency under paragraph (a) of this section includes the assignment of an individual to act as a surrogate for the parents. This must include a method (1) for determining whether a child needs a surrogate parent, and (2) for assigning a surrogate parent to the child.

(c) *Criteria for selection of surrogates*. (1) The public agency may select a surrogate parent in any way permitted under State law.

(2) Public agencies shall insure that a person selected as a surrogate:

(i) Has no interest that conflicts with the interest of the child he or she represents; and

(ii) Has knowledge and skills that insure adequate representation of the child.

(d) *Non-employee requirement; compensation*. (1) A person assigned as a surrogate may not be an employee of a public agency which is involved in the education or care of the child.

(2) A person who otherwise qualifies to be a surrogate parent under paragraph (c) and (d)(1) of this section, is not an employee of the agency solely because he or she is paid by the agency to serve as surrogate parent.

(e) *Responsibilities*. The surrogate parent may represent the child in all matters relating to:

(1) The identification, evaluation, and educational placement of the child, and

(2) The provision of a free appropriate public education to the child.

(20 U.S.C. 1415(b)(1)(B))

PROTECTION IN EVALUATION PROCEDURES

Reg. 300.530 General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of Regs. 300.530-300.534.

(b) Testing and evaluation materials and procedures used for the purposes of evaluation and placement of handicapped children must be selected and administered so as not to be racially or culturally discriminatory.

(20 U.S.C. 1412(5)(C))

Reg. 300.531 Preplacement evaluation.

Before any action is taken with respect to the initial placement of a handicapped child in a special educational program, a full and individual evaluation of the child's educational needs must be conducted in accordance with the requirements of Reg. 300.532.

(20 U.S.C. 1412(5)(C))

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Reg. 300.532 Evaluation procedures.

State and local educational agencies shall insure, at a minimum, that:

(a) Tests and other evaluation materials:

(1) Are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so;

(2) Have been validated for the specific purpose for which they are used; and

(3) Are administered by trained personnel in conformance with the instructions provided by their producers;

(b) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient;

(c) Tests are selected and administered so as best to ensure that when a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (except where those skills are the factors which the test purports to measure);

(d) No single procedure is used as the sole criterion for determining an appropriate educational program for a child; and

(e) The evaluation is made by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of suspected disability.

(f) The child is assessed in all areas related to the suspected disability, including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

(20 U.S.C. 1412(5)(C))

Comment. Children who have a speech impairment as their primary handicap may not need a complete battery of assessments (*e.g.*, psychological, physical, or adaptive behavior). However, a qualified speech-language pathologist would (1) evaluate each speech impaired child using procedures that are appropriate for the diagnosis and appraisal of speech and language disorders, and (2) where necessary, make referrals for additional assessments needed to make an appropriate placement decision.

Reg. 300.533 Placement procedures.

(a) In interpreting evaluation data and in making placement decisions, each public agency shall:

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;

(2) Insure that information obtained from all of these sources is documented and carefully considered;

(3) Insure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the valuation data, and the placement options; and

(4) Insure that the placement decision is made in conformity with the least restrictive environment rules in Regs. 300.550-300.554.

(b) If a determination is made that a child is handicapped and needs special education and related services, an individualized education program must be developed for the child in accordance with Regs. 300.340-300.349 of Subpart C.

(20 U.S.C. 1412(5)(C); 1414(a)(5))

Comment. Paragraph (a)(1) includes a list of examples of sources that may be used by a public agency in making placement decisions. The agency would not have to use all the sources in every instance. The point of the requirement is to insure that more than one source is used in interpreting evaluation data and in making placement decisions. For example, while all of the named sources would have to be used for a child whose suspected disability is mental retardation, they would not be necessary for certain other handicapped children, such as a child who has a severe articulation disorder as his primary handicap. For such a child, the speech-language pathologist, in complying with the multisource requirement, might use (1) a standardized test of articulation, and (2) observation of the child's articulation behavior in conversational speech.

Reg. 300.534 Reevaluation.

Each State and local educational agency shall insure:

(a) That each handicapped child's individualized education program is reviewed in accordance with Regs. 300.340-300.349 of Subpart C, and

(b) That an evaluation of the child, based on procedures which meet the requirements under Reg. 300.532, is conducted every three years or more frequently if conditions warrant or if the child's parent or teacher requests an evaluation.

(20 U.S.C. 1412(5)(c))

ADDITIONAL PROCEDURES FOR EVALUATING SPECIFIC LEARNING DISABILITIES

Reg. 300.540 Additional team members.

In evaluating a child suspected of having a specific learning disability, in addition to the requirements of

Reg. 300.532, each public agency shall include on the multidisciplinary evaluation team:

(a)(1) The child's regular teacher; or

(2) If the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; or

(3) For a child of less than school age, an individual qualified by the State educational agency to teach a child of his or her age; and

(b) At least one person qualified to conduct individual diagnostic examination of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher.

(20 U.S.C. 1411 note.)

[Adopted in 43 Fed. Reg. 65083 (Dec. 29, 1977).]

Reg. 300.541 Criteria for determining the existence of a specific learning disability.

(a) A team may determine that a child has a specific learning disability if:

(1) The child does not achieve commensurate with his or her age and ability levels in one or more of the areas listed in paragraph (a)(2) of this section, when provided with learning experiences appropriate for the child's age and ability levels; and

(2) The team finds that a child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas:

(i) Oral expression;

(ii) Listening comprehension;

(iii) Written expression;

(iv) Basic reading skill;

(v) Reading comprehension;

(vi) Mathematics calculation; or

(vii) Mathematic reasoning.

(b) The team may not identify a child as having a specific learning disability if the severe discrepancy between ability and achievement is primarily the result of:

(1) A visual, hearing, or motor handicap;

(2) Mental retardation;

(3) Emotional disturbance; or

(4) Environmental, cultural or economic disadvantage.

(20 U.S.C. 1411 note.)

[Adopted in 43 Fed. Reg. 65083 (Dec. 29, 1977).]

Reg. 300.542 Observation.

(a) At least one team member other than the child's regular teacher shall observe the child's academic performance in the regular classroom setting.

(b) In the case of a child of less than school age or out of school, a team member shall observe the child in an environment appropriate for a child of that age.

(20 U.S.C. 1411 note.)

[Adopted in 43 Fed. Reg. 65083 (Dec. 29, 1977).]

Reg. 300.543 Written report.

(a) The team shall prepare a written report of the results of the evaluation.

(b) The report must include a statement of:

(1) Whether the child has a specific learning disability;

(2) The basis for making the determination;

(3) The relevant behavior noted during the observation of the child;

(4) The relationship of that behavior to the child's academic functioning;

(5) The educationally relevant medical findings, if any;

(6) Whether there is a severe discrepancy between achievement and ability which is not correctable without special education and related services; and

(7) The determination of the team concerning the effects of environmental, cultural, or economic disadvantage.

(c) Each team member shall certify in writing whether the report reflects his or her conclusion. If it does not reflect his or her conclusion, the team member must submit a separate statement presenting his or her conclusions.

(20 U.S.C. 1411 note.)

[Adopted in 43 Fed. Reg. 65083 (Dec. 29, 1977).]

LEAST RESTRICTIVE ENVIRONMENT

Reg. 300.550 General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of Regs. 300.550-300.556.

(b) Each public agency shall insure:

(1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and

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(2) That special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(20 U.S.C. 1412(5)(B); 1414(a)(1)(C)(iv))

Reg. 300.551 Continuum of alternative placements.

(a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services.

(b) The continuum required under paragraph (a) of this section must:

(1) Include the alternative placements listed in the definition of special education under Reg. 300.13 of Subpart A (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions), and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

(20 U.S.C. 1412(5)(B))

Reg. 300.552 Placements.

Each public agency shall insure that:

(a) Each handicapped child's educational placement:

(1) Is determined at least annually,

(2) Is based on his or her individualized education program, and

(3) Is as close as possible to the child's home;

(b) The various alternative placements included under Reg. 300.551 are available to the extent necessary to implement the individualized education program for each handicapped child;

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and

(d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs.

(20 U.S.C. 1412(5)(B))

Comment. Reg. 300.552 includes some of the main factors which must be considered in determining the extent to which a handicapped child can be educated with children who are not handicapped. The overriding rule in this section is that placement decisions must be made on an individual basis. The section also requires each agency to have various alternative placements available in order to insure that each handicapped child receives an education which is appropriate to his or her individual needs.

The analysis of the regulations for Section 504 of the Rehabilitation Act of 1973 (34 CFR Part 104—Appendix, Paragraph 24) includes several points regarding educational placements of handicapped children which are pertinent to this section:

1. With respect to determining proper placements, the analysis states: "* * * it should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her need * * *."

2. With respect to placing a handicapped child in an alternate setting, the analysis states that among the factors to be considered in placing a child is the need to place the child as close to home as possible. Recipients are required to take this factor into account in making placement decisions. The parents' right to challenge the placement of their child extends not only to placement in special classes or separate schools, but also to placement in a distant school, particularly in a residential program. An equally appropriate education program may exist closer to home; and this issue may be raised by the parent under the due process provisions of this subject.

Reg. 300.553 Non-academic settings.

In providing or arranging for the provision of non-academic and extra-curricular services and activities, including meals, recess periods, and the services and activities set forth in Reg. 300.306 of Subpart C, each public agency shall insure that each handicapped child participates with non-handicapped children in those services and activities to the maximum extent appropriate to the needs of that child.

(20 U.S.C. 1412(5)(B))

Comment. Reg. 300.553 is taken from a new requirement in the final regulations for Section 504 of the Rehabilitation Act of 1973. With respect to this requirement, the analysis of the Section 504 Regulations includes the following statement: "[A new paragraph] specifies that handicapped children must also be provided non-academic services in as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be provided opportunities for participation with other children." (45 CFR Part 84—Appendix, Paragraph 24.)

Reg. 300.554 Children in public or private institutions.

Each State educational agency shall make arrangements with public and private institutions (such as a memorandum

f agreement or special implementation procedures) as may e necessary to insure that Reg. 300.550 is effectively implemented.

(20 U.S.C. 1412(5)(B))

Comment. Under Section 612(5)(B) of the statute, the requirement to educate handicapped children with nonhandicapped children also applies to children in public and private institutions or other care facilities. Each State educational agency must insure that each applicable agency and institution in the State implements this requirement. Regardless of other reasons for institutional placement, no child in an institution who is capable of education in a regular public school setting may be denied access to an education in that setting.

Reg. 300.555 Technical assistance and training activities.

Each State educational agency shall carry out activities to insure that teachers and administrators in all public agencies:

(a) Are fully informed about their responsibilities for implementing Reg. 300.550, and

(b) Are provided with technical assistance and training necessary to assist them in this effort.

(20 U.S.C. 1412(5)(B))

eg. 121.556 Monitoring activities.

(a) The State educational agency shall carry out activities to insure that Reg. 300.550 is implemented by each public agency.

(b) If there is evidence that a public agency makes placements that are inconsistent with Reg. 300.550 of this subpart, the State educational agency:

(1) Shall review the public agency's justification for its actions, and

(2) Shall assist in planning and implementing any necessary corrective action.

(20 U.S.C. 1412(5 B))

CONFIDENTIALITY OF INFORMATION

Reg. 300.560 Definitions.

As used in this subpart:

"Destruction" means physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable.

"Education records" means the type of records covered under the definition of "education records" in Part 99 of this title (the regulations implementing the Family Educational Rights and Privacy Act of 1974).

"Participating agency" means any agency or institution which collects, maintains, or uses personally identifiable information, or from which information is obtained, under this part.

(20 U.S.C. 1412(2)(D); 1417(c))

Reg. 300.561 Notice to parents.

(a) The State educational agency shall give notice which is adequate to fully inform parents about the requirements under Reg. 300.128 of Subpart B, including:

(1) A description of the extent to which the notice is given in the native languages of the various population groups in the State;

(2) A description of the children on whom personally identifiable information is maintained, the types of information sought, the methods the State intends to use in gathering the information (including the sources from whom information is gathered), and the uses to be made of the information.

(3) A summary of the policies and procedures which participating agencies must follow regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information; and

(4) A description of all of the rights of parents and children regarding this information, including the rights under Section 438 of the General Education Provisions Act and Part 99 of this title (the Family Educational Rights and Privacy Act of 1974, and implementing regulations).

(b) Before any major identification, location, or evaluation activity, the notice must be published or announced in newspapers or other media, or both, with circulation adequate to notify parents throughout the State of the activity.

(20 U.S.C. 1412(2)(D); 1417(c))

Reg. 300.562 Access rights.

(a) Each participating agency shall permit parents to inspect and review any education records relating to their children which are collected, maintained, or used by the agency under this part. The agency shall comply with a request without unnecessary delay and before any meeting regarding an individualized education program or hearing relating to the identification, evaluation, or placement of the child, and in no case more than 45 days after the request has been made.

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(b) The right to inspect and review education records under this section includes:

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.

(c) An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.

(20 U.S.C. 1412(2)(D); 1417(c))

Reg. 300.563 Record of access.

Each participating agency shall keep a record of parties obtaining access to education records collected, maintained, or used under this part (except access by parents and authorized employees of the participating agency), including the name of the party, the date access was given, and the purpose for which the party is authorized to use the records.

(20 U.S.C. 1412(2)(D); 1417(c))

Reg. 300.564 Records on more than one child.

If any education record includes information on more than one child, the parents of those children shall have the right to inspect and review only the information relating to their child or to be informed of that specific information.

(20 U.S.C. 1412(2)(D); 1417(c))

Reg. 300.565 List of types and locations of information.

Each participating agency shall provide parents on request a list of the types and locations of education records collected, maintained, or used by the agency.

(20 U.S.C. 1412(2)(D); 1417(c))

Reg. 300.566 Fees.

(a) A participating education agency may charge a fee for copies of records which are made for parents under this part if the fee does not effectively prevent the parents from exercising their right to inspect and review those records.

(b) A participating agency may not charge a fee to search for or to retrieve information under this part.

(20 U.S.C. 1412(2)(D); 1417(c))

Reg. 300.567 Amendment of records at parent's request.

(a) A parent who believes that information in education records collected, maintained, or used under this part is inaccurate or misleading or violates the privacy or other rights of the child, may request the participating agency which maintains the information to amend the information.

(b) The agency shall decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request.

(c) If the agency decides to refuse to amend the information in accordance with the request it shall inform the parent of the refusal, and advise the parent of the right to a hearing under Reg. 300.568.

(20 U.S.C. 1412(2)(D); 1417(c))

Reg. 300.568 Opportunity for a hearing.

The agency shall, on request, provide an opportunity for a hearing to challenge information in education records to insure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child.

(20 U.S.C. 1412(2)(D); 1417(c))

Reg. 300.569 Result of hearing.

(a) If, as a result of the hearing, the agency decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of the child, it shall amend the information accordingly and so inform the parent in writing.

(b) If, as a result of the hearing, the agency decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy of other rights of the child, it shall inform the parent of the right to place in the records it maintains on the child a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the agency.

(c) Any explanation placed in the records of the child under this section must:

(1) Be maintained by the agency as part of the records of the child as long as the record or contested portion is maintained by the agency; and

(2) If the records of the child or the contested portion is disclosed by the agency to any party, the explanation must also be disclosed to the party.

(20 U.S.C. 1412(2)(D); 1417(c))

Reg. 300.570 Hearing procedures.

A hearing held under Reg. 300.568 of this subpart must be conducted according to the procedures under Reg. 99.92 of this title.

(20 U.S.C. 1412(2)(D); 1417(c))

Reg. 300.571 Consent.

(a) Parental consent must be obtained before personally identifiable information is:

(1) Disclosed to anyone other than officials of participating agencies collecting or using the information under this part, subject to paragraph (b) of this section; or

(2) Used for any purpose other than meeting a requirement under this part.

(b) An educational agency or institution subject to Part 99 of this title may not release information from education records to participating agencies without parental consent unless authorized to do so under Part 99 of this title.

(c) The State educational agency shall include policies and procedures in its annual program plan which are used in the event that a parent refuses to provide consent under this section.

(20 U.S.C. 1412(2)(D); 1417(c))

Reg. 300.572 Safeguards.

(a) Each participating agency shall protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

(b) One official at each participating agency shall assume responsibility for insuring the confidentiality of any personally identifiable information.

(c) All persons collecting or using personally identifiable information must receive training or instruction regarding the State's policies and procedures under Reg. 300.129 of Subpart B and Part 99 of this title.

(d) Each participating agency shall maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.

(20 U.S.C. 1412(2)(D); 1417(c))

Reg. 300.573 Destruction of information.

(a) The public agency shall inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child.

(b) The information must be destroyed at the request of the parents. However, a permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

(20 U.S.C. 1412(2)(D); 1417(c))

Comment. Under Reg. 300.573, the personally identifiable information on a handicapped child may be retained permanently unless the parents request that it be destroyed. Destruction of records is the best protection against improper and unauthorized disclosure. However, the records may be needed for other purposes. In informing parents about their rights under this section, the agency should remind them that the records may be needed by the child or the parents for social security benefits or other purposes. If the parents request that the information be destroyed, the agency may retain the information in paragraph (b).

Reg. 300.574 Children's rights.

The State educational agency shall include policies and procedures in its annual program plan regarding the extent to which children are afforded rights of privacy similar to those afforded to parents, taking into consideration the age of the child and type or severity of disability.

(20 U.S.C. 1412(2)(D); 1417(c))

Comment. Note that under the regulations for the Family Educational Rights and Privacy Act (45 CFR 99.44(a)), the rights of parents regarding education records are transferred to the student at age 18.

Reg. 300.575 Enforcement.

The State educational agency shall describe in its annual program plan the policies and procedures, including sanctions, which the State uses to insure that its policies and procedures are followed and that the requirements of the Act and the regulations in this part are met.

(20 U.S.C. 1412(2)(D); 1417(c))

Reg. 300.576 Office of Education.

If the Office of Education or its authorized representatives collect any personally identifiable information regarding handicapped children which is not subject to 5 U.S.C. 552a (The Privacy Act of 1974), the Commissioner shall apply the requirements of 5 U.S.C. Section 552a.(b)(1)-(2), (4)-(11); (c); (d); (e)(1); (2); (3)(A), (B), and (D), (5)-(10); (h); (m); and (n), and the regulations implementing those provisions in Part 5b of this title.

(20 U.S.C. 1412(2)(D); 1417(c))

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OFFICE OF EDUCATION PROCEDURES

Reg. 300.580 Opportunity for a hearing.

The Commissioner gives a State educational agency reasonable notice and an opportunity for a hearing before taking any of the following actions:

(a) Disapproval of a State's annual program plan under Reg. 300.113 of Subpart B.

(b) Withholding payments from a State under Reg. 300.590 or under Section 434(c) of the General Education Provisions Act.

(c) Waiving the requirement under Reg. 300.589 of this subpart regarding supplementing and supplanting with funds provided under Part B of the Act.

(20 U.S.C. 1232c(c); 1413(a)(9)(B); 1413(c); 1416)

Reg. 300.589 Waiver of requirement regarding supplementing and supplanting with Part B funds.

(a) Under Sections 613(a)(9)(B) and 614(a)(2)(B)(ii) of the Act, State and local educational agencies must insure that Federal funds provided under Part B of the Act are used to supplement the level of State and local funds expended for the education of handicapped children, and in no case to supplant those State and local funds. Beginning with funds appropriated for fiscal year 1979 and for each following fiscal year, the nonsupplanting requirement only applies to funds allocated to local educational agencies. (See Reg. 300.372.)

(b) If the State provides clear and convincing evidence that all handicapped children have available to them a free appropriate public education, the Commissioner may waive in part the requirement under Sections 613(a)(9)(B) and 614(a)(2)(B)(ii) of the Act if the Commissioner concurs with the evidence provided by the State.

(c) If a State wishes to request a waiver, it must inform the Commissioner in writing. The Commissioner then provides the State with a finance and membership report form which provides the basis for the request.

(d) In its request for a waiver, the State shall include the results of a special study made by the State to obtain evidence of the availability of a free appropriate public education to all handicapped children. The special study must include statements by a representative sample of organizations which deal with handicapped children, and parents and teachers of handicapped children, relating to the following areas:

(1) The adequacy and comprehensiveness of the State's system for locating, identifying, and evaluating handicapped children, and

(2) The cost to parents, if any, for education for children enrolled in public and private day schools, and in public and private residential schools and institutions, and

(3) The adequacy of the State's due process procedures.

(e) In its request for a waiver, the State shall include finance data relating to the availability of a free appropriate public education for all handicapped children, including:

(1) The total current expenditures for regular education programs and special education programs by function and by source of funds (State, local, and Federal) for the previous school year, and

(2) The full-time equivalent membership of students enrolled in regular programs and in special programs in the previous school year.

(f) The Commissioner considers the information which the State provides under paragraph (d) and (e) of this section, along with any additional information he may request, or obtain through on-site reviews of the State's education programs and records, to determine if all children have available to them a free appropriate public education, and if so, the extent of the waiver.

(g) The State may request a hearing under Regs. 300.580-300.583 with regard to any final action by the Commissioner under this section.

(20 U.S.C. 1411(c)(3); 1413(a)(9)(B))

[The next page is 102:89.]

Subpart F—State Administration

STATE EDUCATIONAL AGENCY RESPONSIBILITIES: GENERAL

Reg. 300.600 Responsibility for all educational programs.

(a) The State educational agency is responsible for insuring:

(1) That the requirements of this part are carried out; and

(2) That each educational program for handicapped children administered within the State, including each program administered by any other public agency:

(i) Is under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency, and

(ii) Meets education standards of the State educational agency (including the requirements of this part).

(b) The State must comply with paragraph (a) of this section through State statute, State regulation, signed agreement between respective agency officials, or other documents.

(20 U.S.C. 1412(6))

Comment. The requirement in Reg. 300.600(a) is taken essentially verbatim from section 612(6) of the statute and reflects the desire of the Congress for a central point of responsibility and accountability in the education of handicapped children within each State. With respect to State educational agency responsibility, the Senate Report on P.L. 94-142 includes the following statements:

This provision is included specifically to assure a single line of responsibility with regard to the education of handicapped children, and to assure that in the implementation of all provisions of this Act and in carrying out the right to education for handicapped children, the State educational agency shall be the responsible agency * * *. Without this requirement, there is an abdication of responsibility for the education of handicapped children. Presently, in many States, responsibility is divided, depending upon the age of the handicapped child, sources of funding, and type of services delivered. While the Committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency. (Senate Report No. 94-168, p. 24 (1975))

In meeting the requirements of this section, there are a number of acceptable options which may be adopted, including the following:

(1) Written agreements are developed between respective State agencies concerning State educational agency standards and monitoring. These agreements are binding on the local or regional counterparts of each State agency.

(2) The Governor's Office issues an administrative directive establishing the State educational agency responsibility.

(3) State law, regulation, or policy designates the State educational agency as responsible for establishing standards for all educational programs for the handicapped, and includes responsibility for monitoring.

(4) State law mandates that the State educational agency is responsible for all educational programs.

USE OF FUNDS

Reg. 300.620 Federal funds for State administration.

A State may use five percent of the total State allotment in any fiscal year under Part B of the Act, or $200,000, whichever is greater, for administrative costs related to carrying out sections 612 and 613 of the Act. However, this amount cannot be greater than the amount which the State may use under Reg. 300.704 or Reg. 300.705, as the case may be.

(20 U.S.C. 1411(b), (c))

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Reg. 300.621 Allowable costs.

(a) The State educational agency may use funds under Reg. 300.620 of this Subpart for:

(1) Administration of the annual program plan and for planning at the State level, including planning, or assisting in the planning, of programs or projects for the education of handicapped children;

(2) Approval, supervision, monitoring, and evaluation of the effectiveness of local programs and projects for the education of handicapped children;

(3) Technical assistance to local educational agencies with respect to the requirements of this part;

(4) Leadership services for the program supervision and management of special education activities for handicapped children; and

(5) Other State leadership activities and consultative services.

(b) The State educational agency shall use the remainder of its funds under Reg. 300.620 in accordance with Reg. 300.370 of Subpart C.

(20 U.S.C. 1411(b), (c))

STATE ADVISORY PANEL

Reg. 300.650 Establishment.

(a) Each State shall establish, in accordance with the provisions of this subpart, a State advisory panel on the education of handicapped children.

(b) The advisory panel must be appointed by the Governor or any other official authorized under State law to make those appointments.

(c) If a State has an existing advisory panel that can perform the functions in Reg. 300.652, the State may modify the existing panel so that it fulfills all of the requirements of this subpart, instead of establishing a new advisory panel.

(20 U.S.C. 1413(a)(12))

Reg. 300.651 Membership.

(a) The membership of the State advisory panel must be composed of persons involved in or concerned with the education of handicapped children. The membership must include at least one person representative of each of the following groups:

(1) Handicapped individuals.

(2) Teachers of handicapped children.

(3) Parents of handicapped children.

(4) State and local educational officials.

(5) Special education program administrators.

(b) The State may expand the advisory panel to include additional persons in the groups listed in paragraph (a) of this section and representatives of other groups not listed.

(20 U.S.C. 1413(a)(12))

Comment. The membership of the State advisory panel, as listed in paragraphs (a)(1)-(5), is required in section 613(a)(12) of the Act. As indicated in paragraph (b), the composition of the panel and the number of members may be expanded at the discretion of the State. In adding to the membership, consideration could be given to having:

(1) An appropriate balance between professional groups and consumers (i.e., parents, advocates, and handicapped individuals);

(2) Broad representation within the consumer-advocate groups, to insure that the interests and points of view of various parents, advocates and handicapped individuals are appropriately represented;

(3) Broad representation within professional groups (e.g., (a) regular education personnel, (b) special educators, including teachers, teacher trainers, and administrators, who can properly represent various dimensions in the education of handicapped children, and (c) appropriate related services personnel); and

(4) Representatives from other State advisory panels (such as vocational education).

If a State elects to maintain a small advisory panel (e.g., 10-15 members), the panel itself could take steps to insure that it (1) consults with and receives input from various consumer and special interest professional groups, and (2) establishes committees for particular short-term purposes composed of representatives from those input groups.

Reg. 300.652 Advisory panel functions.

The State advisory panel shall:

(a) Advise the State educational agency of unmet needs within the State in the education of handicapped children;

(b) Comment publicly on the State annual program plan and rules or regulations proposed for issuance by the State regarding the education of handicapped children and the procedures for distribution of funds under this part; and

(c) Assist the State in developing and reporting such information and evaluations as may assist the Commissioner in the performance of his responsibilities under Section 618.

(20 U.S.C. 1413(a)(12))

Reg. 300.653 Advisory panel procedures.

(a) The advisory panel shall meet as often as necessary to conduct its business.

(b) By July 1 of each year, the advisory panel shall submit an annual report of panel activities and suggestions to the

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State educational agency. This report must be made available to the public in a manner consistent with other public reporting requirements under this part.

(c) Official minutes must be kept on all panel meetings and shall be made available to the public on request.

(d) All advisory panel meetings and agenda items must be publicly announced prior to the meeting, and meetings must be open to the public.

(e) Interpreters and other necessary services must be provided at panel meetings for panel members or participants. The State may pay for these services from funds under Reg. 300.620.

(f) The advisory panel shall serve without compensation but the State must reimburse the panel for reasonable and necessary expenses for attending meetings and performing duties. The State may use funds under Reg. 300.620 for this purpose.

(20 U.S.C. 1413(a)(12))

Subpart G—Allocation of Funds; Reports

ALLOCATIONS

Reg. 300.700 Special definition of the term State.

For the purposes of Regs. 300.701, 300.702, and 300.704-300.708, the term "State" does not include Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(20 U.S.C. 1411(a)(2))

Reg. 300.701 State entitlement; formula.

(a) The maximum amount of the grant to which a State is entitled under section 611 of the Act in any fiscal year is equal to the number of handicapped children aged three through 21 in the State who are receiving special education and related services, multiplied by the applicable percentage, under paragraph (b) of this section, of the average per pupil expenditure in public elementary and secondary schools in the United States.

(b) For the purposes of the formula in paragraph (a) of this section, the applicable percentage of the average per pupil expenditure in public elementary and secondary schools in the United States for each fiscal year is:

(1) 1978—5 percent,
(2) 1979—10 percent,
(3) 1980—20 percent,
(4) 1981—30 percent,
(5) 1982, and for each fiscal year after 1982, 40 percent.

(20 U.S.C. 1411(a)(1))

(c) For the purposes of this section, the averge per pupil expenditure in public elementary and secondary schools in the United States, means the aggregate expenditures during the second fiscal year preceding the fiscal year for which the computation is made (or if satisfactory data for that year are not available at the time of computation, then during the most recent preceding fiscal year for which satisfactory data are available) of all local educational agencies in the United States (which, for purposes of this section, means the fifty States and the District of Columbia), plus any direct expenditures by the State for operation of those agencies (without regard to the source of funds from which either of those expenditures are made), divided by the aggregate number of children in average daily attendance to whom those agencies provided free public education during that preceding year.

(20 U.S.C. 1411(a)(4))

Reg. 300.702 Limitations and exclusions.

(a) In determining the amount of a grant under Reg. 300.701 of this subpart, the Commissioner may not count:

(1) Handicapped children in a State to the extent that the number of those children is greater than 12 percent of the number of all children aged five through 17 in the State; and

(2) Children with specific learning disabilities to the extent that the number of those children is greater than two percent of the number of all children aged five through 17 in the State; and

(3) Handicapped children who are counted under section 121 of the Elementary and Secondary Education Act of 1965.

(b) For the purposes of paragraph (a) of this section, the number of children aged five through 17 in any State shall be determined by the Commissioner on the basis of the most recent satisfactory data available to him.

(20 U.S.C. 1411(a)(5))

[Subparagraph (a)(2) was deleted in 42 Fed. Reg. 65083 (Dec. 29, 1977); however, subparagraph (a)(3) was not renumbered.]

Reg. 300.703 Ratable reductions.

(a) *General.* If the sums appropriated for any fiscal year for making payments to States under section 611 of the Act are not sufficient to pay in full the total amounts to which all States are entitled to receive for that fiscal year, the maximum amount which all States are entitled to receive for that fiscal year shall be ratably reduced. In case additional funds become available for making payments for any fiscal year during which the preceding sentence is applicable, those reduced amounts shall be increased on the same basis they were reduced.

(20 U.S.C. 1411(g)(1))

(b) *Reporting dates for local educational agencies and allocations.*

(1) In any fiscal year in which the State entitlements have been ratably reduced, and in which additional funds have not been made available to pay in full the total of the amounts under paragraph (a) of this section, the State educational agency shall fix dates before which each local educational agency shall report to the State the amount of funds available to it under this part which it estimates it will expend.

(2) The amounts available under paragraph (a)(1) of this section, or any amount which would be available to any other local educational agency if it were to submit an application meeting the requirements of this part, which the State educational agency determines will not be used for the period of its availability, shall be available for allocation to those local educational agencies, in the manner provided in Reg. 300.707, which the State educational agency determines will need and be able to use additional funds to carry out approved programs.

(20 U.S.C. 1411(g)(2))

Reg. 300.704 Hold harmless provision.

No State shall receive less than the amount it received under Part B of the Act for fiscal year 1977.

(20 U.S.C. 1411(a)(1))

Reg. 300.705 Within-State distribution: fiscal year 1978.

Of the funds received under Reg. 300.701 of this subpart by any State for fiscal year 1978:

(a) 50 percent may be used by the State in accordance with the provisions of Reg. 300.620 of Subpart F and Reg. 300.370 of Subpart C, and

(b) 50 percent shall be distributed to local educational agencies in the State in accordance with Reg. 300.707.

(20 U.S.C. 1411(b)(1))

Reg. 300.706 Within-State distribution: fiscal year 1979 and after.

Of the funds received under Reg. 300.701 by any State for fiscal year 1979, and for each fiscal year after fiscal year 1979:

(a) 25 percent may be used by the State in accordance with Reg. 300.620 of Subpart F and Reg. 300.370 of Subpart C, and

(b) 75 percent shall be distributed to the local educational agencies in the State in accordance with Reg. 300.707.

(20 U.S.C. 1411(c)(1))

Reg. 300.707 Local educational agency entitlements; formula.

From the total amount of funds available to all local educational agencies, each local educational agency is entitled to an amount which bears the same ratio to the total amount as the number of handicapped children aged three through 21 in that agency who are receiving special education and related services bears to the aggregate number of handicapped children aged three through 21 receiving special education and related services in all local educational agencies which apply to the State educational agency for funds under Part B of the Act.

(20 U.S.C. 1411(d))

Reg. 300.708 Reallocation of local educational agency funds.

If a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all handicapped children residing in the area served by the local agency with State and local funds otherwise available to the local agency, the State educational agency may reallocate funds (or portions of those funds which are not required to provide special education and related services) made available to the local agency under Reg. 300.707, to other local educational agencies within the State which are not adequately providing special education and related services to all handicapped children residing in the areas served by the other local educational agencies.

(20 U.S.C. 1414(e))

Reg. 300.709 Payments to Secretary of Interior.

(a) The Commissioner is authorized to make payments to the Secretary of the Interior according to the need for that assistance for the education of handicapped children on reservations serviced by elementary and secondary schools operated for Indian children by the Department of the Interior.

(b) The amount of those payments for any fiscal year shall not exceed one percent of the aggregate amounts available to all States for that fiscal year under Part B of the Act.

(20 U.S.C. 1411(f)(1))

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Reg. 300.710 Entitlements to jurisdictions.

(a) The jurisdictions to which this section applies are Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(b) Each jurisdiction under paragraph (a) of this section is entitled to a grant for the purposes set forth in section 601(c) of the Act. The amount to which those jurisdictions are so entitled for any fiscal year shall not exceed an amount equal to 1 percent of the aggregate of the amounts available to all States under this part for that fiscal year. Funds appropriated for those jurisdictions shall be allocated proportionately among them on the basis of the number of children aged three through twenty-one in each jurisdiction. However, no jurisdiction shall receive less than $150,000, and other allocations shall be ratably reduced if necessary to insure that each jurisdiction receives at least that amount.

(c) The amount expended for administration by each jurisdiction under this section shall not exceed 5 percent of the amount allotted to the jurisdiction for any fiscal year, or $35,000, whichever is greater.

(20 U.S.C. 1411(e))

REPORTS

Reg. 300.750 Annual report of children served—report requirement.

(a) The State educational agency shall report to the Commissioner no later than February 1 of each year the number of handicapped children aged three through 21 residing in the State who are receiving special education and related services.

(b) The State educational agency shall submit the report on forms provided by the Commissioner.

(20 U.S.C. 1411(a)(3))

Comment. It is very important to understand that this report and the requirements that relate to it are solely for allocation purposes. The population of children the State may count for allocation purposes may differ from the population of children to whom the State must make available a free appropriate public education. For example, while section 611(a)(5) of the Act limits the number of children who may be counted for allocation purposes to 12 percent of the general school population aged five through seventeen, a State might find that 14 percent (or some other percentage) of its children are handicapped. In that case, the State must make free appropriate public education available to all of those handicapped children.

Reg. 300.751 Annual report of children served—information required in the report.

(a) In its report, the State educational agency shall include a table which shows:

(1) The number of handicapped children receiving special education and related services on December 1 of that school year;

(2) The number of those handicapped children within each disability category, as defined in the definition of "handicapped children" in Reg. 300.5 of Subpart A; and

(3) The number of those handicapped children within each of the following age groups:

(i) Three through five;

(ii) Six through seventeen; and

(iii) Eighteen through twenty-one.

(b) A child must be counted as being in the age group corresponding to his or her age on the date of the count: October 1 or February 1, as the case may be.

(c) The State educational agency may not report a child under more than one disability category.

(d) If a handicapped child has more than one disability, the State educational agency shall report that child in accordance with the following procedure:

(1) A child who is both deaf and blind must be reported as "deaf-blind."

(2) A child who has more than one disability (other than a deaf-blind child) must be reported as "multihandicapped."

(20 U.S.C. 1411(a)(3); 1411(a)(5)(A)(ii); 1418(b))

Reg. 300.752 Annual report of children served—certification.

The State educational agency shall include in its report a certification signed by an authorized official of the agency that the information provided is an accurate and unduplicated count of handicapped children receiving special education and related services on the dates in question.

(20 U.S.C. 1411(a)(3); 1417(b))

Reg. 300.753 Annual report of children served—criteria for counting children.

(a) The State educational agency may include handicapped children in its report who are enrolled in a school or program which is operated or supported by a public agency, and which either:

(1) Provides them with both special education and related services; or

(2) Provides them only with special education if they do not need related services to assist them in benefiting from that special education.

(b) The State educational agency may not include handicapped children in its report who:

(1) Are not enrolled in a school or program operated or supported by a public agency;

(2) Are not provided special education that meets State standards;

(3) Are not provided with a related service that they need to assist them in benefiting from special education;

(4) Are counted by a State agency under Section 121 of the Elementary and Secondary Education Act of 1965, as amended; or

(5) Are receiving special education funded solely by the Federal Government. However, the State may count children covered under Reg. 300.186(b) of Subpart B.

(20 U.S.C. 1411(a)(3); 1417(b))

Comment. 1. Under paragraph (a), the State may count handicapped children in a Head Start or other preschool program operated or supported by a public agency if those children are provided special education that meets State standards.

2. "Special education," by statutory definition, must be at no cost to parents. As of September 1, 1978, under the free appropriate public education requirement, both special education and related services must be at no cost to parents.

There may be some situations, however, where a child receives special education from a public source at no cost, but whose parents pay for the basic or regular education. This child may be counted. The Office of Education expects that there would only be limited situations where special education would be clearly separate from regular education—generally, where speech therapy is the only special education required by the child. For example, the child might be in a regular program in a parochial or other private school but receiving speech therapy in a program funded by the local educational agency. Allowing these children to be counted will provide incentives (in addition to complying with the legal requirement in Section 613(a)(4)(A) of the Act regarding private schools) to public agencies to provide services to children in private schools, since funds are generated in part on the basis of the number of children provided special education and related services. Agencies should understand, however, that where a handicapped child is placed in or referred to a public or private school for educational purposes, special education includes the entire educational program provided to the child. In that case, parents may not be charged for any part of the child's education.

A State may not count Indian children on or near reservations and children on military facilities if it provides them no special education. If a State or local educational agency is responsible for serving these children, and does provide them special education and related services, they may be counted.

Reg. 300.754 Annual report of children served—other responsibilities of the State educational agency.

In addition to meeting the other requirements in this subpart, the State educational agency shall:

(a) Establish procedures to be used by local educational agencies and other educational institutions in counting the number of handicapped children receiving special education and related services;

(b) Set dates by which those agencies and institutions must report to the State educational agency to insure that the State complies with Reg. 300.750(a);

(c) Obtain certification from each agency and institution that an unduplicated and accurate count has been made;

(d) Aggregate the data from the count obtained from each agency and institution, and prepare the reports required under this subpart; and

(e) Insure that documentation is maintained which enables the State and the Commissioner to audit the accuracy of the count.

(20 U.S.C. 1411(a)(3); 1417(b))

Comment. States should note that the data required in the annual report of children served are not to be transmitted to the Commissioner in personally identifiable form. States are encouraged to collect these data in non-personally identifiable form.

[Appendix A. Analysis of Final Regulation, was removed from the Code of Federal Regulations in 43 Fed. Reg. 57255 (Dec. 7, 1978). The text of Appendix A is reproduced in Volume I, "Legislative History: P.L. 94-142 and Regulations."]

[Regional Resource Centers begins on page 102:501.]

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Appendix F

CASES

In re: Case # 079-002) FINDINGS OF FACT, CONCLUSIONS

) AND DECISION

This matter came on for open hearing on October 12, 1979. Petitioner, , was not present, but was represented by his parents who were assisted by David C. Heartman, Director of the Cerebral Palsy Center. Respondent Denver Public Schools was represented by Theodore White, Director of Special Education. Testimony and documentary evidence were received, additional documentary evidence as requested by the Hearing Officer was received on October 17, 1979, and the Hearing Officer pursuant to assent of the parties visited Sabin Elementary School on October 25, 1979. Based upon the testimony and documentary evidence received and considered, and the visitation, the Hearing Officer hereby makes the following findings of facts, conclusions, and decision.

JURISDICTION AND ISSUES

Upon stipulation of the parties, the Hearing Officer finds that he has proper jurisdiction over the subject matter and the parties pursuant to Public Law 93-380 as amended by Public Law 94-142, the Colorado Rules For the Administration of the Handicapped Children's Educational Act, and Section 504 of the Rehabilitation Act of 1973.

It has been stipulated that is a handicapped child under the appropriate definitions in said laws. The issue for determination is the appropriate placement of in a program of special education. Respondent Denver Public Schools asserts that its program for mentally retarded and seriously handicapped at Sabin Elementary School is a free appropriate public education which is provided at public expense under public supervision and direction without charge, meets the standards of the state educational agency and is provided in conformity with an individualized education program which meets the requirements of law under Public Law 94-142. Petitioner asserts that the individual education program is unspecific, that recreation has not been programmed and that the educational program offered is not in the least restrictive environment as required by law. Each of these assertions of the Petitioner shall be discussed by the Hearing Officer.

FACTS

is a six-year-old, severely mentally retarded, hypotonic cerebral palsied hydrocephalic and visually impaired individual. He attended the SEED program at Sewell Rehabilitation Center and enrolled in the United Cerebral Palsy Center in September of 1976. was placed at Sabin Elementary School of the Denver Public Schools in September of 1978 and has continued there to this date.

In January of 1978, the Denver Public Schools passed Resolution 2010 which commenced a process to expand direct services to those handicapped individuals who were not being served by the Denver Public Schools at the time. In February of 1978, the Denver Public Schools by

Resolution 2016 established a panel to advise the School Board concerning school-age children presently in community-centered board programs who may be eligible for direct services within the public school system. Parents with children below the age of five (5) were apparently not included in Resolution 2016's application. In August of 1978, Dr. James O'Hara sent a letter to and erroneously advised them that the process of educational staffings had begun and that was to be included in that process. This letter was retracted by a letter of August 25, 1978, acknowledging the error and advising that was eligible to attend the public school program starting August 30, 1978, and that should he continue to attend the Cerebral Palsy Center School, there would be no financial support given to that center from the Denver Public Schools. On October 17, 1978, wrote to the public schools expressing a desire to appeal the decision concerning placement. Simultaneously, Dr. Mary-E. Franza, Instructional Consultant for the Denver Public Schools, wrote to advising them of their right to appeal. Numerous communications occurred thereafter, and several conferences were held culminating in a decision by the Board of Education on April 17, 1979, approving the recommendation of the 2016 committee. Subsequent appeal to the State Department of Education was attempted by , and the matter was finally referred back to an impartial hearing held on October 12, 1979. The Hearing Officer finds that although there existed a one-year delay from the time of initial request by for appeal and the time of impartial hearing, the delay was not a willful or malicious design of the Denver Public Schools. The delay was occasioned by change in policy and procedures attempting to implement

Resolution 2010 of the Denver Board of Education to expand direct services to those handicapped individuals not being served. The Hearing Officer finds that the Denver Public Schools responded in timely fashion to all communications from , and that the frustration of in affecting a timely appeal was considerable, but unpreventable. All procedural defects which may have occurred were waived by at the impartial hearing on October 12, 1979, and a decision on the merits was requested by both parties. The Denver Public Schools is reminded of the timelines required by Public Law 94-142, and such a delay as was occasioned in this case cannot again occur.

DISCUSSION

1. The individualized education program. (Hereafter termed IEP).

The Petitioner asserts that the IEP is incomplete, and by reference refers the Hearing Officer to the Petitioner's Exhibits "3" and "4" for comparison purposes. The Hearing Officer finds that a staffing occurred October 9, 1978, at which , and representatives of the Denver Public Schools and United Cerebral Palsy Center were present. An IEP containing program recommendations, assessment summary, annual goals and short-term objectives was drafted at that time. See Respondent's Exhibits "AA", "BB", and "EE". A review of program occurred December 11, 1978, (Respondent's Exhibit "EE" and "FF") and a review of program occurred March 19, 1979 (Respondent's Exhibit "BB" and "CC"). The Hearing Officer finds that the IEP and subsequent reviews comply with the requirements of Section 121a. 346 of the Rules and Regulations promulgated August 23, 1977, by the Department of Health, Education and Welfare, Office of Education,

concerning Education of Handicapped Children and Implementation of Part B of the Education of the Handicapped Act, hereafter referred to as the Federal Rules and Regulations. Specifically, the IEP includes a statement of the child's present levels of educational performance, annual goals including short-term instructional objectives, specific special education and related services to be provided to the child, the extent to which the child will be able to participate in regular programs, projected times for initiation of services and anticipated duration of the services, and appropriate objective criteria and evaluation procedures and schedules for determining on at least an annual basis whether the short-term instructional objectives are being achieved. As will be noted hereafter, the IEP is deficient in content in regard to the extent of participation in regular education programs (least restrictive environment) and recreation shall be considered later in the decision. The Hearing Officer specifically finds that the burden of proof upon the Denver Public Schools has been met and that with the exception as noted above, the Petitioner's assertion in this regard is without merit.

2. Recreation.

The Hearing Officer finds that free appropriate public education means special education and related services. Related services has been defined in the Federal Rules and Regulations in Section 121a. 13(a) to be supportive services as are required to assist a handicapped child to benefit from special education, and includes recreation. In sub-paragraph (9) of said section, recreation is further defined to include assessment of leisure function, therapeutic recreation services, recreation programs in the schools and community agencies and leisure education. The Hearing Officer has received testimony from Mr. White that although

recreation has not been included in the IEP to date, the Denver Public Schools would consider recreation if appropriate. testified that she considered recreation such as the water activities to be a form of physical therapy. The Hearing Officer finds that the Denver Public Schools have specifically considered the physical therapy needs of and have structured a program to meet those needs adequately. From the evidence before him, the Hearing Officer cannot find that recreation is required to assist to benefit from the special education program, and therefore, cannot find that the related service of recreation need be provided under the concept of "free appropriate public education."

3. Least restrictive environment.

The Denver Public Schools asserts that has been placed in the least restrictive environment by virtue of placement in Sabin Elementary School, a school having classes for both handicapped and nonhandicapped individuals. for the Petitioner asserts that least restrictive environment includes contact with nonhandicapped children, field trips into the public sector, lunch with nonhandicapped children, and in general, a greater opportunity to intermix with the nonhandicapped population. The Federal Rules and Regulations in Section 121a. 550 (b) state in part that each public agency shall insure: (1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped. It is the finding of the Hearing Officer that the legal requirement of least restrictive environment is not satisfied by merely placement of the handicapped child in a school which also educates nonhandicapped children.

The environment referred to in the law necessitates a specific investigation on a case-by-case basis as to whether or not the program being provided establishes the requirement of maximum extent of contact with children who are not handicapped if appropriate. Respondent's Exhibit "BB" which states that least restrictive environment is "to be determined and arranged as appropriate" is not satisfactory in regard to the extent of participation in regular education programs (least restrictive environment) for . Mr. White testified that the Denver Public Schools recognizes its obligation to have children learn with other children of their ages who are nonhandicapped and that in fact, the junior and senior high school handicapped students have been transferred from Sabin Elementary School to accomplish a greater interaction with nonhandicapped children. The classroom teacher, Rosemary Volpe, testified that during the last two (2) months, the only contact her class had with nonhandicapped children occurred approximately once every two (2) weeks during recess. Further, Ms. Volpe testified that the amount of interaction with nonhandicapped children is determined by her and has not been a priority in consideration of other learning activities. The Hearing Officer observed that the physical plant at Sabin Elementary School for the Handicapped is located in one wing of the school, and that the children who are handicapped enter and exit because of the architectural accessibility at the end of that wing away from the classes for nonhandicapped. The Hearing Officer specifically finds that some interaction with nonhandicapped students is appropriate for and that is not being educated in the least restrictive environment by mere placement at Sabin Elementary School.

CONCLUSION AND DECISION

The Hearing Officer specifically determines that the IEP of the Denver Public Schools for is sufficient at law and that the lack of a recreation program is not an unlawful deficiency since it is not required to meet the needs of the Petitioner. The Hearing Officer further concludes that the program of does not meet the requirement at law of least restrictive environment. In view of the fact that is presently placed at Sabin Elementary School, it is the decision of the Hearing Officer that the Denver Public Schools develop a written program at Sabin Elementary School for which would include regular interaction with nonhandicapped children either at the school or in the community. In the event said program is not developed within sixty (60) days of the date of this decision, the Hearing Officer specifically finds that the Denver Public Schools will not have met the requirement of law pertaining to least restrictive environment as contained in the Federal Rules and Regulations. The specific nature of said program shall be left to the discretion of the educators and may include activities such as regular interaction during class time, recess, lunch, school assemblies, or other appropriate places.

DATED this 1st day of November, 1979.

By Steven L. Zimmerman
Steven L. Zimmerman
Hearing Officer

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PENNY WILLIAMS, by and through her father, NORMAN B. WILLIAMS,

Petitioner

vs

JORDAN SCHOOL DISTRICT,

Respondent.

HEARING EXAMINER DECISION

Impartial Due Process Hearing Held
March 9-10, 1978

Jordan School District Office
9361 South 400 East
Sandy, Utah

For the Petitioner:

DENNIS V. HASLAM,
Nelson, Hardin, Richards, Leonard and Tate
48 Post Office Place
Salt Lake City, Utah

For the Respondent:

RALPH HAWS
Director of Special Programs
Jordan School District

DAN S. BUSHNELL
LARRY WHITE
Kirton, McConkie, Boyer and Boyle
330 South Third East
Salt Lake City, Utah

Hearing Officer:

DONALD F. KLINE
1579 Ellendale
Logan, Utah

PETITIONER'S Declaration: PENNY WILLIAMS, by and through her father, NORMAN B. WILLIAMS, and Counsel of Record, DENNIS V. HASLAM, request, ". . . that Penny be provided a sign language interpreter in her classes" at the Terra Linda Elementary School in the Jordan School District. (Verbatim Transcript, p. 13)

RESPONDENT'S Declaration: Jordan School District, by and through RALPH HAWS, Director of Special Programs, and Counsel of Record, DAN S. BUSHNELL and LARRY WHITE, maintain, ". . . that it is not in the best interest of Penny or Jordan School District to provide an interpreter, and that it (an interpreter) is not necessary for a free and appropriate public education under the statute." (Verbatim transcript, p. 16.)

FINDINGS OF FACT

General Findings

Prior to the hearing, a determination was made by the Hearing Examiner that the Jordan School District had complied with all aspects of the required procedural safeguards. Full disclosure requirements were met by the exchange of written evidence and lists of witnesses at least five days prior to the conduct of the hearing. Interrogatories directed to the Petitioner (Verbatim Transcript (VT) p. 8 et. seq.) further established that all aspects of the required procedural safeguards had been met.

Counsel for the Respondent has entered for the benefit of the record a Memorandum of Law contending no jurisdiction in this matter under Section 504 of the Rehabilitation Act of 1973 and/or P.L. 94-142, the Education of All Handiapped Children Act of 1975. Counsel for the Petitioner has entered for the benefit of the record a reply to the Memorandum of Law submitted by Respondent under the date of March 3, 1978 at the time of the Hearing. i.e., March 9, 1978.

The Hearing Examiner did not rule upon these issues at this time on the basis that such matters should be left to a court of appropriate jurisdiction rather than become an issue in an Administrative Due Process Hearing.

Findings of Fact from Petitioner's Witnesses and Exhibits

The Examiner finds the following facts based on the testimony and exhibits presented by the Petitioner.

1. Penny Williams, an 11 year old female resides at 8036 South 2280 West in West Jordan, Utah with her parents and attends the Terra Linda Elementary School in the Jordan School District.
2. Petitioner, PENNY WILLIAMS, has a younger female sibling who attends the Murray School for the Deaf.
3. Petitioner's parents, NORMAN B. AND KAREN WILLIAMS, are deaf and/or profoundly hard of hearing.
4. Petitioner, PENNY WILLIAMS, attended the Idaho School for the Deaf for a period of two (2) months.
5. Petitioner, PENNY WILLIAMS, uses sign language as her normal method of communication with her family and learned sign language from other family members.
6. Penny Williams has a typical schedule of classes for an elementary school child except for speech therapy which she receives twice weekly on Monday and Wednesday from Miss Peggy Lee Tanner. Speech therapy is provided for a total of fifty (50) minutes per week.
7. Penny Williams uses the teleprinter machine to communicate with others via phone and is reasonably proficient in the use of the equipment.

8. Penny Williams seems to be a very well adjusted eleven (11) year old girl who responded exceptionally well during direct examination and cross-examination.

9. Penny Williams has been fitted with hearing aids for both ears, complains that wearing both aids causes her to be "nervous" and frequently wears only one of her two aids.

10. Penny Williams is a proficient speech reader. (Confirmation of her lip reading--speach reading--ability is found in testing requested by the Hearing Examiner. Penny was given the Utley Lip Reading test by Patty Gailey and Susan Merril, Jordan School District Audiologist, on March 14, 1978. Results of this examination are entered into the record by the Examiner, March 21, 1978. Prior agreement to further examination for the benefit of the record was secured from Counsel of Record for both the Petitioner and the Respondent on March 10, 1978.)

11. Testing of lip reading ability was conducted on March 14, 1978 using the Utley Lip Reading test. She responded correctly to 28 sentences out of 31 when a voiceless presentation was made and to 29 out of 31 sentences when a voiced presentation was made. Penny demonstrated a 90% score for voiceless

presentation and 94% score under voiced presentation. Lip reading skill for both presentations was excellent.

12. Penny Williams hearing loss, confirmed by tests administered February 28, 1978 and March 14, 1978 indicate a bilateral profound hearing loss through 1000 Hz and no response at equipment limits for 2000 Hz through 8000 Hz. Penny is aware of speech sounds, although not necessarily able to understand spondee words, at 85 decibles unaided and at 35 decibles when wearing a single aid--the left.

13. Social adjustment of the subject is excellent and there was no evidence presented to suggest that the subject had any serious emotional problems beyond the normal frustrations of children of the same age and circumstance.

14. Penny Williams has average to above average intelligence based on standardized tests for the deaf and non-verbal portions of Revised Wechler Scale of Intelligence for Children. Tests administered November 21, 1971 (Leiter International Performance Scale, 1948 Revision) by M. A. Nielson, Ph.D., indicate an I.Q. of 120. Tests administered March 14, 1978 by David G. Weight, Ph.D. (Leiter International Performance Scale and Block Design Subscale of the Revised Weschler Intelligence Scale

for Children) indicate an I.Q. of 87 and 100 respectively. (It should be noted that testing conditions and circumstances frequently cause variation in I.Q. test results. Observation of the subject during the examination and cross-examination strongly suggest that the results of the test administered by M. A. Nielson, Ph.D. in 1971 more nearly reflect Penry's intellectual ability.)

Findings of Fact from Respondent's Witnesses and Exhibits

The Examiner finds the following facts based on the testimony and exhibits presented by the Respondent:

1. That the Jordan School District identified, assessed, and placed Penny Williams in the sixth grade of the Terra Linda Elementary School and developed an Individual Educational Program in accordance with Utah State Board of Education, Rules and Regulations for Programs for the Handicapped, Adopted July 1, 1974, (revised 12-19-75), the Ammended Annual Program Plan for FY 1978 Under P.L. 94-142, Part B Education for All Handicapped Children Act, Submitted July 7, 1977 to the Bureau of Education for the Handicapped, U.S. Office of Education, and specifically under Section 612 (4) and appropriate subsections of P.L. 94-142, an extension and amendment of P.L. 93-380.
2. That in the development of the Individual Educational Plan for Penny Williams, alternative placements were considered.
3. That Penny Williams is currently functioning above the composite average of her grade level and academic placement was based on extensive teacher observations, and standardized test data.
4. That both the strengths and weakness of the subject were taken into consideration in the development of the Individual Educational Program.

5. That the subject, Penny Williams, is functioning very adequately socially, emotionally, and in the areas of adaptive behavior.
6. That the subject, Penny Williams, has many speech problems related to her profound hearing loss.
7. That the speech therapy currently being provided is inadequate in relation to the speech problems evident in the subject's speech.
8. That in the absence of amplification (use of properly fitted hearing aid(s) there is a high probability that the petitioner, Penny Williams, hearing will deteriorate over time.
9. That suitable, proper or "appropriate" placement was determined on the basis of standardized test data, extensive teacher observation, achievement test data, and speech and audiometric test data.
10. That an Individual Educational Program (IEP) was developed and an Individual Implementation Program (IIP) was developed in behalf of Petitioner, Penny Williams.
11. That the Jordan School District placed the Petitioner, Penny Williams, in a regular classroom consistent with the mandate in P.L. 94-142 of "least restrictive environment" consistent with the needs of the individual.
12. That optional placement of the Petitioner, Penny Williams, in a more restrictive environment--the

Murray School for the Deaf--where sign language interpreters and sign language is used as the principal method of communication was left with the parents.

13. That the parents refused this option as suitable or appropriate.

DECISION AND ORDER

The Hearing Examiner has reviewed the reports submitted in evidence and heard the testimony and statements of the witnesses presented by both the Petitioner and Respondent. As a result of this examination he finds no evidence that the Respondent, JORDAN SCHOOL DISTRICT, or the employees thereof have acted in an arbitrary, capricious, or discriminatory manner.

The principal finding of the Hearing Examiner sustains the declaration and plea of the Respondent, JORDAN SCHOOL DISTRICT. Further, it is the Hearing Examiner's finding that a sign language interpreter for the Petitioner, PENNY WILLIAMS, would tend to inhibit rather than enhance her ability to adapt to and function effectively within a society of non-hearing impaired individuals at this time.

Rationale

The rationale for this finding is based upon, but not limited to, the fact that profoundly hard of hearing individuals frequently abandon the use of amplification in the absence of a motivation to continue its use. Providing a sign language interpreter for the Petitioner, PENNY WILLIAMS, at this time would indeed remove the motivation she has for using the amplification made possible through her hearing aid(s). Further, to abandon the consistent use of amplification creates the very high probability (substantiated by the testimony of Mr. Rex Scott, VT, p.102)

that the Petitioner's hearing would in all probability deteriorate over time. Moreover, evidence entered for the benefit of the record at the request of the Hearing Examiner, with the concurrence of Counsel of Record for both parties, shows that the Petitioner's sound awareness level drops from 35 dB (decibles) when aided by amplification to 85 dB or greater in the absence of amplification. Petitioner's potential ability to learn to discriminate between and among sounds, not only for better understanding of speech but essential to improvement of speech, in the absence of consistent use of amplification is seriously impaired.

With the full realization that this is an important period of Petitioner's life in terms of her ability to acquire academic knowledge and skills--an ability that has not been seriously impaired according to the evidence and testimony presented during the hearing--it is also an important period for learning sound discrimination as an integral part of adequate speech and preservation of such residual hearing as may be present.

It is the Hearing Examiner's finding that it is in the Petitioner's best interest to continue to function in the "least restrictive environment" which in this case is a regular classroom of non-hearing impaired peers and without the assistance of a sign language interpreter.

The preponderance of the evidence sustains the conclusion that the Petitioner, PENNY WILLIAMS, is in an appropriate,

suitable, and proper educational placement that is consistent not only with her academic needs but also her need to continue to function effectively in a non-hearing impaired society.

A secondary finding of the Hearing Examiner in this matter is that the Respondent, JORDAN SCHOOL DISTRICT, is in non-compliance with the Rules and Regulations for Programs for the Handicapped (Exhibit 15, Appendix B, p. 9).

The Rules and Regulations for Programs for the Handicapped state:

> C. When handicapped services are provided by itinerant teachers, the minimum time should be 1/2 hour per contact with pupil.

Uncontested testimony (VT, p. 39 and p. 79) indicates that speech therapy is provided by the itinerant speech teacher twice weekly for twenty (20) to twenty-five (25) minutes rather than the prescribed thirty (30) minutes per contact with the pupil. Further, the Hearing Examiner finds that the Respondent, JORDAN SCHOOL DISTRICT, is not, in light of the multiple sound substitutions, omissions, and distortions in Petitioner's speech, providing suitable or appropriate education and training in the area of sound discrimination training and/or speech therapy.

Unfortunately, Petitioner's prayer in this matter did not seek relief from the non-compliance with the State Board of Education Rules and Regulations for Programs for the Handicapped (op.cit.). It is, therefore, not within the purview of the Hearing Examiner to provide such relief.

It is within the purview of the Hearing Examiner, however, to advise the State Superintendent of Public Instruction of this non-compliance on the part of the JORDAN SCHOOL DISTRICT and to strongly recommend that the State Board of Education provide relief through appropriate administrative avenues available to them. Further, the Hearing Examiner will recommend:

(1) That the JORDAN SCHOOL DISTRICT provide compensatory time to the extent feasible;

(2) That the JORDAN SCHOOL DISTRICT increase the frequency of speech therapy to not less than three (3) days per week for a minimum of 1/2 hour per contact with the Petitioner;

(3) That the JORDAN SCHOOL DISTRICT amend the Individual Education Program for Petitioner, PENNY WILLIAMS, stating realistic long term and short term goals as a basis for assessing the effectiveness of the program offered.

By copy of this decision of the Hearing Examiner the State Superintendent of Public Instruction shall be so advised.

This decision and order shall be binding on all parties to this hearing and shall be implemented without delay.

Either party involved in this matter may appeal this decision to the State Board of Education for administrative review. Either party involved in this matter may further appeal this decision to a court of appropriate jurisdiction.

Date: _____

Donald F. Kline, Ph.D.
Hearing Examiner

, by and through his parents, Petitioner vs Respondent	HEARING EXAMINER'S DECISION AND ORDER Impartial Due Process Hearing Held June 5, 1980 Multipurpose Room of the Primary Building,

For Petitioner:

For Respondent:

Hearing Officer:

PETITIONER'S Declaration: , by and through his parents, and Counsel of Record, , request, . . . that a due process hearing determine why , should not receive free, door-to-door, supervised transportation on a weekly basis in accordance with requests made during Individual Educational Program (I.E.P.) meetings with the Utah Schools for the Deaf and the Blind pursuant to the Education for All Handicapped Children Act, 20 U.S.C., &1401 et seq. and 45 C.F.R. &121a.302. (Letter of May 23, 1980 and Verbatim Transcript, p. 11).

RESPONDENT'S Declaration: , by and through , Specialist in Special Education; , Superintendent; and , Assistant Attorney General for the State of Utah maintain,. . .the ' are providing and , is receiving an appropriate education. Respondent states the , came to the at his parent's request knowing what the transportation was in November, 1978. . .We think we have made every effort to find an appropriate resolution of this issue and finally we think that transportation, as related service should be decided on case by case basis on demonstrated need (Verbatim Transcript, pgs. 12 and 13).

FINDINGS OF FACT

General Findings

At the initiation of the hearing, the Hearing Examiner determined that the were in substantial compliance with all aspects of the required procedural safeguards. Full disclosure requirements were met by the exchange of written evidence and lists of witnesses at least five days prior to the conduct of the hearing. Both Petitioner and Respondent stipulated to this finding (Verbatim Transcript (VT) p. 8). Interrogatories directed to Petitioner (VT p. 9 et seq.) further established that all aspects of the required procedural safeguards had been met.

Findings of Fact from Petitioner's Witnesses and Evidentiary Materials

The Hearing Examiner finds the following facts based on the testimony and evidentiary materials presented:

1. , a 14 year old male resides at , Utah with his natural father and stepmother, and .

2. has attended the during all or part of the 1978-79 school year and during the 1979-80 school year.

3. voluntarily enrolled their son in the Even though Petitioner was placed voluntarily by his parents, the placement was not a unilateral decision by . Rather, placement was one of three alternatives suggested by the school district in which the reside.

4. That an individual Education Program was developed for the 1979-80 school year by the ' and that participated in the development of IEP on or about October 24, 1979.

5. The IEP developed for on or about October 24, 1979 contains an entry showing that it was anticipatd that would have weekly interaction with his parents (Petitioner's Exhibit B).

6. The IEP was signed by and representatives of the on or about February 6, 1980.

7. was certified as a deaf-blind student. (Petitioner's Exhibit C). Respondent stipulated that the certificate was authentic. Further, the classification of Petitioner was not at issue at this hearing.

8. Weekend transportation for and for other students of the schools was arranged by representatives of the . These arrangements included several modes of transportation including the Utah Transit Authority buses and a carrier identified as Servi-Car.

9. Weekend transportation was provided between the School and one or more locations in Salt Lake City, Utah for .

10. The costs of transporting Petitioner from one or more of the locations in Salt Lake City, Utah that served as a terminus for the buses and Petitioner's home was absorbed by Petitioner's parents; except that Petitioner's parents were (or will be) reimbursed by the for six (6) round trips during the school year. The reimbursement was (or will be) made on the basis of sixteen cents (16¢) per mile and applied to the distance from Petitioner's home to the School .

11. is not capable of travel by public transportation systems without supervision at this point in his development.

Findings of Fact from Respondent's Witnesses and Evidentiary Materials

The Hearing Examiner finds the following facts based on the testimony and evidentiary materials presented by Respondent at the time of the hearing.

1. were (or will be) reimbursed for Petitioner's transportation at the rate of sixteen cents (16¢) per mile with the rate being applied to the distance from Petitioner's home to the School . Six (6) round trips were (or will be) paid for by the State.

2. That the State Board of Education, under whose aegis the operate, has a policy regarding transportation and the reimbursement thereof that needs clarification (Respondent's Exhibit A, p. 29 et seq.).

3. An Individual Education Program (IEP) is a written document establishing long and short term goals and/or objectives for the education of a handicapped child. The IEP is required under Public Law 94-142 (Education for All Handicapped Children Act). Public

Law 94-142 requires participatory decision making on the part of the child's parents and the educational agency providing the education and related services. The IEP is valid only when it has been signed by the child's parents or guardians and appropriate representatives of the educational agency (VT p. 108).

4. An appropriate IEP had been developed for on or about October 24, 1979 but was not signed by the parent until February 6, 1980.
5. Related services mean transportation and such developmental, corrective, and other support services as are required to assist a handicapped child benefit from special education (45 C.F.R. 121a.13; See also, VT p. 109).
6. Related services to be provided must be an intregal part of the IEP if such services are to provided at no cost to the parent (VT p. 109 et seq.; See also, C.F.R. 121a.4).

DECISION AND ORDER

The hearing Examiner has examined and reviewed the testimony and all evidenciary materials presented by both Petitioner and Respondent at the time of the Due Process Hearing held in behalf of on Thursday, June 5, 1980.

As a result of this examination and review, the Hearing Examiner has determined that prayer of Petitioner involves:
(1) A determination of whether or not was placed at the by the unilateral action of his parents and the extent to which a local education agency--the primary source of education for handicapped children in Utah--participated in the placement decision. (2) A determination regarding the frequency of the transportation to be provided a student enrolled in a residential facility, (3) a determination regarding the safety of the transportation being provided and (4) a determination regarding the cost, if any, that Petitioner's parents should be expected to bear.

Decision Related to Issue Identified as (1) Above

It is Hearing Examiner's finding that the parents of went to the Jordan School District at some unspecified date in September, 1978. At that time 's strengths and limitations were assessed and annual goals were established by the Jordan School District and 's father, (pgs. 1-2 of Petitioner's Exhibit A). Hearing Examiner also finds that a "Parent Permission for Placement" form listed three alternatives for placement, one of which was the " School for the Deaf".

The Parent Permission for Placement form was not signed by Petitioner's parents. Hearing Examiner finds that voluntary placement was made by

Petitioner's parents (VT p. 40 et seq.). Hearing Examiner also finds that the placement was not a unilaterial action on the part of 's parents. Rather, Petitioner's parents appropriately solicited the assistance of a local education agency (Jordon School District) in making a determination regarding the placement of their son, .

Had Petitioner's parents made a unilaterial decision without regard to the adequacy of services offered by their local school district, the placement could be construed as a 'private placement' of despite the fact that the school in which was placed (the) is a largely state-funded and operated institution. Had such been the case, 121a.450 - 121a.460 could bear significantly on this decision. Hearing Examiner's finding that the placement was voluntary but <u>not</u> a unilaterial decision renders this a moot issue.

<u>Decision and Order Related to Issue Identified as (2) Above</u>

It is the Hearing Examiner's finding and order that prayer of Petitioner for weekly transportation be granted.

<u>Rationale</u>

The rationale for this finding and order is based upon the fact that the Individual Education Program developed by the and Petitioner's father, , on or about October 24, 1979 clearly indicates interactions between Petitioner and his family on a weekly basis was anticipated. The IEP developed on the above referenced date clearly specifies that " 's parents will continue using over-correction procedures for specific inappropriate behaviors." And, under the same subheading on the IEP identified as "Home" it states, " 's parents will continue use of weekly notebook to expedite communication." (Petitioner's Exhibit B, one of several pages identified as "page 2").

While it might be argued that the word "Parent" was used in a generic sense and could apply to "dormatory parent(s)" or "surrogate parent(s)" as well as the natural parent or step-parent, the Hearing Examiner would find such an argument totally unpersuasive. The Hearing Examiner's opinion in this matter is based on the fact that no reference was made to any parent other than the natural parent or step-parent during the course of the hearing. While employees of the function as surrogate parents of children under their care it is inconceivable that anything other than the natural parent or step-parent was intended when the October 24, 1979 IEP for was written.

A further rationale for this finding and order is based on the use of the word "weekly" in the IEP developed for Petitioner on or about October 24, 1979. By definition the word "weekly" means something computed or determined by the week; a weekly room rent, for example. And, a week by definition is a period of seven successive days, usually understood as beginning on Sunday and ending with Saturday. It is impossible for the Hearing Examiner to imagine that any other interpretation was intended or possible.

It should be noted that Respondent's witness, Dr. Ben Bruse, Compliance Officer for P.L. 94-142 for the State of Utah, responded in the affirmative when asked if this statement in the IEP intended or suggested that weekly contact with parents was anticipated in order to implement the IEP (VT p. 125-126).

Finally, the question at issue revolves around the appropriateness of the number of transportation arrangements that should be provided as a "related service" for residential students. Neither the statute nor regulations set an absolute minimum number of trips home when a child is placed in a residential facility. It is the Hearing Examiner's opinion that

students placed in a residential facility for educational purposes should have transportation provided at the beginning of the school term and for scheduled school holidays, recesses and the end of the school year as a minimum. However, State policy should at least permit case-by-case determination when a handicapped child needs more home contact. Any arbitrary limitation not subject to the individual education program developed for a specific child would be inconsistent with Part B of Public Law 94-142 as this part relates to providing a free appropriate public education in the least restrictive environment

Decision and Order Related to Issue Identified as (3) Above

It is the Hearing Examiner's finding and order that supervised door-to-door transportation be provided.

Rationale

Convincing testimony at Hearing established that Petitioner's safety was in jeopardy on one or more occasions during the past school year while being transported from the School to downtown Salt Lake City, Utah (VT p. 74). Testimony established that got off the bus while his sister went to the back of the bus to get 's suitcase. Witness testified that she ". . . grabbed a hold of his arm and he lurched away from me and went around the bus and right into the middle of Fourth South. He would have been hit by a car if the light hadn't been red because he was out in the middle of the road before we caught him."

While it is not possible to conjecture about the reason Petitioner ran into the middle of the street, it is established by testimony that , a certified deaf-blind student, was being transported in a vehicle that did not comply with Title 41, Article 13, Section 41-6-100.10 of the School Laws of the State of Utah, 1978. This section reads, in part as follows:

> (1) every school bus, when operated for the transportation of school pupils shall bear upon the front and rear thereof a plainly visible sign containing the words "school bus" in letters no less than eight inches in height, which shall be removed or covered when the vehicle is not in use for the transportation of school pupils. Every school bus when operated for the transportation of school children shall be equipped with alternating flashing red light signals visible from the front and rear of a type to be approved and mounted as pre-scribed by the department.

This language in the statute clearly suggests that vehicles may be used for purposes other than the transportation of school pupils. Hearing Examiner can only conjecture what the courts might hold regarding the use of a vehicle alleged to be operating as a convenience to parents and not owned and operated by the school for the transportation of school pupils. It seems clear, however, that a plainly visible sign containing the words "school bus" is to be displayed during those times when a public vehicle is being used on a regular basis, whether daily or weekly, for the transportation of school pupils. Uncontested testimony at hearing established the fact that the vehicle (apparently the Servi-Car Van) used for the transportation of Petitioner was not equipped with the required signs or alternating flashing red lights as required by law. Uncontested testimony also established that on at least one occasion Petitioner darted from the vehicle and ran into a normally busy street where he might have been struck by oncoming traffic if the stop light at the intersection had not been red.

It is assumed by the Hearing Examiner that the purpose of the alternating flashing red light signals serves as a stop light for traffic approaching from either direction much the same way a stop light regulates traffic at a busy intersection.

Hearing Examiner is aware of the testimony (VT p. 87-88-96) that transportation was arranged in behalf of the parents and did not involve the Schools. In light of the following facts: (1) that the Performance Auditor states that the Schools "contract" (Respondent's Exhibit A, p. 23) for the transportation of day students, (2) testimony presented at hearing indicates that the business office of the School sold tickets for the buses (VT p. 87) (3) parents made their checks payable to the (VT p. 78), (4) the transportation specialist arranged for a mother to supervise the loading and unloading of the buses (VT p. 72) and (5) an aid was provided from time to time when UTA buses were used for the transportation of pupils from the Ogden campus to a terminus in downtown Salt Lake City, the assertion that the Schools were not involved in the transport of children and that these arrangements were done solely as a convenience to the parents is totally unconvincing.

Hearing Examiner is also cognizant of a question asked by Counsel for Respondent of one of Petitioner's witnesses designed to establish that could have run into a residential street as easily as he ran into a downtown street in Salt Lake City while he was deboarding from the bus (VT p. 71-72). This question served to confirm in the mind of the Hearing Examiner the need for adequate supervision of Petitioner when being transported from one place to any other place.

It must be recognized that all children tend to be unaware of the hazards presented by motor vehicles and that even those children who are advanced for their chronological ages are easily distracted and sometimes forget the eminent dangers of motor vehicles. It is all the more important, therefore, to recognize that handicapped children, especially deaf-blind children, are particularly susceptible to such hazards.

Finally, Hearing Examiner is well aware of Respondent's Exhibit A wherein the use of public transportation is advocated by the Performance Auditor for students of both Schools "who are capable" (Emphasis added) of being transported to and from school by such conveyance. Hearing Examiner applauds this recommendation for students "who are capable". Such students should be taught to use public transportation systems as a part of their mobility training and to assist them in becoming as independent as possible. Absent testimony that Petitioner has reached a point in his development making him capable of using public transportation systems, Hearing Examiner finds that supervised transportation must be provided at the present time.

Hearing Examiner is also aware of the absence of any goals or objectives regarding mobility in the October 24, 1979, IEP developed for Petitioner. Absent any evidence or testimony that Petitioner is or is not in need of such training, Hearing Examiner must rely on the evidence that
is a certified deaf-blind student, functioning at minimum levels of development for his age and, therefore, in need of supervision whenever he is in an unfamiliar environment (Petitioner's Exhibit B; See also Petitioner's Exhibit A).

Decision and Order Related to Issue Identified as (4) Above

It is the Hearing Examiner's finding and order that transportation be provided at no cost to the parents.

Rationale

Hearing Examiner, relying on 45 C.F.R. 121a.4 wherein a free appropriate public education is defined, orders that transportation for
be provided at no cost to the parents.

The definition referenced above states:

> . . . special education and related services. . . (a) are provided at public expense under public supervision and direction and without charge. (b) Meets the standards of the State education agency, including the requirements of this part, (c) includes preschool,

elementary school, or secondary school education in the State involved, and (d) Are provided in conformity with an individualized education program which meets the requirements under 121a.340-121a.349 Subpart C. (20 U.S.C. 1401(18)).

Summary of Findings and Orders

The Hearing Examiner finds in favor of Petitioner on each of the matters at issue and grants petitioner's prayer that shall receive free, door-to-door, supervised transportation on a weekly basis in accordance with the Individual Education Program developed by the and Petitioner's father, on or about October 24, 1979.

It is noted that this order is not retroactive. Because of Petitioner's agreement to postponments of the Due Process Hearing pending prolonged negotiotions with Respondent, any expenses incurred during this time rests with Petitioner.

Further, it is the Hearing Examiner's order that the parents of Petitioner, shall respond as any normal parent to having children at home regularly or on a limited weekend basis. That is, transportation provided on a weekly basis is not to be construed as transportation "on demand". will be transported from the weekly during the school year and his parents, will be expected to accomodate the needs of Petitioner as other parents accomodate the needs of their children.

Petitioner's prayer in this matter did not include a request for relief from a specific type or types of transportation currently provided or to be provided under this order. Neither did Petitioner's prayer seek judgment regarding the general or specific qualifications of those who supervise the transportation to be provided.

It is not within the purview of the Hearing Examiner, therefore, to rule on these matters. It is within the purview of the Hearing Examiner, however, to advise the State Superintendent of Public Instruction of the need to establish policy regarding these matters (if such policies do not now exist) and to recommend that the State Board of Education act with all prudent haste in establishing such policies.

By copy of this decision the State Superintendent of Public Instruction shall be so advised.

This decision and order shall be binding on all parties to this hearing and shall be implemented without delay.

Either party involved in this matter may appeal this decision to the State Board of Education for administrative review. Either party involved in this matter may further appeal this decision to a court of appropriate jurisdiction.

_____

Hearing Examiner

Dated this 18th day of
June, 1980.

APPENDIX G

NOTES ON WRITING THE DECISION

WRITING THE DECISION

Decision writing is a unique, specific, and difficult task for most non-lawyers. The language of the law is frequently unfamiliar and the use of litigation that has come down from the courts in helping establish precedent is based on specific (individual) cases and may or may not parallel the specific case of concern to the hearing officer. Precedent in the law is established through landmark cases such as PARC,[1] Mills,[2] and LeBank v. Spears.[3] These cases were class action matters and involved broad categories of handicapped children and hinged on constitutional as well as statutory rights. Other cases involving a single individual have lesser impact in establishing precedent in the law.

Cases involving a single individual hinge on the specific facts that may be unique to that particular case and, therefore, should be used with caution when applying the case to one before the due process hearing tribunal. In nearly every instance inductive reasoning (reasoning that depends upon thinking from the specific to the general) is required when applying an individual case to broader legal issues.

One technique that may prove helpful to the due process hearing officer is to look at similar cases and chart the fact of each case together with the facts of the case to be decided. The chart could look something like the one below.

	Case A	Case B	Case C	Case D
FACTS: (based on obvious and expert testimony)	Age of child	Age of child	etc.	My case: Age of child
	Handicapping condition	Handicapping condition	etc.	Handicapping condition
	Evaluation	Evaluation	etc.	Evaluation/Nondiscriminatory
	Placement	Placement	etc.	Appropriate placement
	Expert testimony	Expert testimony	etc.	Facts established by the obvious, stipulation, and/or expert testimony.

When cases can be grouped to provide many similarities, a generalization may be drawn. This is the usual method of building a body of case law from highly individualized cases containing unique facts. The model suggested above will, of course, have many different entries in each column. There may also be many similarities. This is the point at which judiciary descretion (hearing officer) judgment and skill are required. Remember, there is no substitute for common sense. In the Willowbrook deinstitutionalization decision, the court failed to consider that children with highly contagious hepatitis B were to be placed in an environment with many other children who were susceptible if exposed to the disease. As a result, many of the children from the Willowbrook School were necessarily returned to a residential environment where they could be treated and other children would not be exposed to the disease. While this is an unusual circumstance, the hearing officer is well advised to become as familiar with as many of the facts in a particular case as possible before making his/her decision. Hearing officers will not be called upon to make decisions and issue orders in class action matters. Their decisions may, however, carry considerable weight with residents within a school district and/or broader community, e.g., the deaf community, the associations for the mentally retarded, etc.

In writing your decisions, remember to write to the point. Write in good, clear English. Don't overwrite! One of the most frequent mistakes among those who are not completely familiar with a specific discipline (the law) is to overwrite. Be precise, be clear, be brief.

See Appendix F for some examples of decisions written by experienced hearing officers.

APPENDIX H

PRE-HEARING CONFERENCE

Pre-Hearing Conference

Experienced due process hearing officers strongly recommend a pre-hearing conference. The purpose of the conference is to clarify procedural matters and to specify the issues that will be heard. The hearing officer should not discuss the merits of the case. The hearing officer should not become involved in attempts to mediate differences between petitioner and respondent. The hearing officer should not offer advice to either party. The pre-hearing conference must be held in the presence of the principle parties concerned. Discussion with either party separately could result in an ex parte (of one part; on one side) relationship.

In conducting a pre-hearing conference, the hearing officer may want to have a verbatim recording of the proceedings. In the absence of a verbatim recording, the hearing officer must keep extensive, complete, and accurate notes in order to provide a record and to avoid any subsequent misunderstanding.

Immediately after the pre-hearing conference, the hearing officer should make the conference a matter of record by writing all parties concerned. The written record should contain: (1) Clarification on any procedural points that may have been discussed, and (2) A specific statement of the issues to be resolved at the hearing. While the time, place, and other physical arrangements for the hearing should have been settled prior to the pre-hearing conference, the hearing officer is well advised to restate these details in the correspondence to all parties concerned.

If the issues to be resolved are bitterly contested by the parties involved, the hearing officer may want to issue a pre-hearing order. A sample of a pre-hearing order is found below.

HEARING OFFICER

Logan, Utah 84321

IN THE GRANITE SCHOOL DISTRICT

SALT LAKE COUNTY, STATE OF UTAH

Confidential

, by and through his parents, and Counsel of Record, MR. JOHN E.B. MYERS PETITIONERS -vs- GRANITE SCHOOL DISTRICT, Counsel of Record, MR. BYRON FISHER RESPONDENT	HEARING EXAMINER'S PRE-HEARING ORDER

On Wednesday, 29 April, 1981 Hearing Examiner held a pre-hearing conference with counsel of record for Petitioner and Respondent. The letter from Counsel of Record for Petitioner, MR. JOHN E.B. MYERS, under the date of 24 April, 1981 articulating the issues which he proposed for the forthcoming hearing on 7 May, 1981, served as an agenda for the pre-hearing conference. A copy of the letter containing Hearing Examiner's pencil notation made during the pre-hearing conference will be entered for benefit of the record at the forthcoming hearing.

As a result of the pre-hearing conference, Hearing Examiner ruled that the following issues, and no others, will be heard at the hearing scheduled for 7 May , 1981. The issues to be heard are:

1. Have circumstances surrounding the placement of subject changed sufficiently to justify a modification or change in Hearing Examiner's Decision and Order of 5 January, 1981?

2. Is the appropriate educational placement of subject, , a year round, twenty-four hour residential placement?

3. Would removal of subject, , from his authorized temporary placement at the School be injurious to him?

Hearing Examiner's rationale for dismissal of issues proposed by Petitioner's Counsel of Record under the Date of 24 April, 1981.

Issue identified as 1 in document referenced above:

Respondent's Counsel of Record indicated a willingness to stipulate that subject, , was physically present at the School on 24 March, 1981 when served their 94-142 complaint on the Granite School District.

Issue identified as 2 in document referenced above:

Subject was and is at the School by prior agreement between and the Granite School District. present educational placement was approved by Hearing Examiner as a temporary placement pending the availability of "beds and space" at the Treatment and Education Center . (See correspondence between Joyce C. Barnes, Director of Special Education, and Hearing Examiner under the dates of 28 January, 1981 and 4 February, 1981 respectively. Both documents will be entered as exhibits for benefit of the record by Hearing Examiner at the forthcoming hearing.)

Issue identified as 3 in document referenced above:

Subject's ". . .educational placement within the meaning of the Education for All Handicapped Children Act from and after his first enrollment at School. . . " has a clearly established history and is traceable in the verbatim transcript of the hearing held on 15-16 December, 1980 and subsequent documents, all of which will be entered for benefit of the record at the forthcoming hearing.

Issue identified as 4 in document referenced above:

Hearing Examiner has ruled that this issue shall be heard at the forthcoming hearing.

Issue identified as 5 in document referenced above:

The question of whether or not the Granite School District has a twenty-four hour residential placement that is appropriate to needs is clearly evident in Hearing Examiner's Decision and Order of 5 January, 1981 by ordering placement at or similar residential facility. If the question is intended to establish that a twenty-four hour residential facility is available and operating under the direct aegis of the Granite School District the answer is in the negative. However, the Education for All Handicapped Children Act and the rules and regulations promolgated thereunder clearly establish that if the local education agency does not have appropriate educational programs and/or facilities available it is obligated to contract for appropriate educational programs and related services in the least restrictive environment. Respondent, Granite School

District, has made every effort to carry out this mandate and has established a clear and convincing history of this effort in the case of subject, . (See Hearing Examiner's Decision and Order of 5 January, 1981 and correspondence between Granite School District and Hearing Examiner referenced under Issue identified as 3 above.)

Issue identified as 6 in document referenced above:

See Hearing Examiner's Decision and Order of 5 January, 1981 indicating that should not be placed in a closed institution. Hearing Examiner views the School as more restrictive than or other residential facilities where the public schools are used for educational purposes.

Issue identified as 7 in document referenced above:

Hearing Examiner views this issue as a repetition of issue 4. Hearing Examiner has, therefore, combined issues 4 and 7 and ruled that this issue shall be heard at the forthcoming hearing.

Issue identified as 8 in document referenced above:

Hearing Examiner has instructed Counsel of Record for both Petitioner and Respondent to issue Memoranda of Law regarding this issue. There is no need to put on evidence or hear testimony related to this issue since Hearing Examiner has previously ordered that subject, , shall be placed in a twenty-four hour residential facility at no cost to subject or his parents. Memoranda of Law are now requested in light of case law and rulings that have come down from other Due Process Hearings and Courts throughout the country that should be helpful to Hearing Examiner in arriving

at a decision and order related to this issue set for hearing on 7 May, 1981. Counsel for both Petitioner and Respondent shall submit Memoranda of Law on this issue within ten (10) working days subsequent to the forthcoming hearing.

Issue identified as 9 in document referenced above:

Hearing Examiner is of the opinion that due to the time between subject's current placement at the School and the original Decision and Order of 5 January 1981, the matter is worthy of consideration at the forthcoming hearing.

Hearing Examiner enunciated at the pre-hearing conference that he had no inclination to change or modify his order issued under the date of 5 January, 1981 without ample reason. Further, Hearing Examiner has determined that this is not a new hearing. Rather, it is an extension of the hearing held 15-16 December, 1981. When viewed as an extension, Hearing Examiner is of the opinion that Petitioner has assumed a substantial burden of proof and must put on evidence and testimony to establish the need and justification for Hearing Examiner to amend, or otherwise change, his Decision and Order of 5 Janaury, 1981 which was unanimously upheld by a State level review panel thereby exhausting the administrative remedies available under the Education for All Handicapped Children Act making it possible for Petitioner to carry the matter directly to a court of appropriate jurisdiction. As noted in Hearing Examiner's response to Petitioner's Motion for Disqualification on 23 April, 1981, "Hearing Examiner's agreement to hear the matter now pending comes solely as a result of Respondent's request that a hearing be held thereby suggesting justification that new evidence and new testimony are (now) appropriate."

It should be noted that Hearing Examiner will ensure entry for benefit of the Record Petitioner's Motion for Disqualification as well as Hearing Examiner's Response.

Hearing Examiner will also enter for benefit of the Record the verbatim transcript of the hearing held 15-16 December, 1980 together with all evidentiary materials contained therein.

ORDERED this 30th Day of April, 1981

HEARING EXAMINER

APPENDIX I

JURISDICTION OF DUE PROCESS HEARING OFFICERS

JURISDICTION OF DUE PROCESS HEARING OFFICERS

Hearing officers always face the problems of knowing those issues over which they have jurisdiction. Is it within the jurisdiction of a due process hearing officer to award damages? If in the course of conducting a due process hearing he/she comes upon issues that have not been specified in a petitioner's prayer, can he rule on these issues? Can a due process hearing officer use the hearing as a platform to enable a school district to accomplish some needed reform to benefit handicapped children? Remembering that P.L. 94-142 is designed not only to guarantee a free appropriate public education, nondiscriminatory evaluation, procedural due process, and parental participatory decision making but also as a vehicle for the schools to ensure that handicapped students receive individualized educational programs and related services, what are the limits of the hearing officer?

Current law on the subject is found in the landmark precedent setting cases such as PARC,[1] Mills,[2] and LeBanks v. Spears.[3] Other litigation, while limited by the facts involved in a particular case, also shed some light on the question of jurisdiction. Loughran v. Flanders (See at 3 EHLR 551:161 et seq.) held that alleged cause for monetary damages would be contrary to both the history and the purpose of the Education for All Handicapped Children Act of 1975 and its statutory predecessors.

One of the functions of the Act inter alia is to provide parents/guardians of a handicapped child the opportunity to participate in the educational decision making process. A guarantee of this right of participatory decision making regarding a handicapped child is the impartial due process hearing whereby a parent/guardian may challenge: (1) the identification, (2) the evaluation, and/or (3) the placement of a

handicapped child (20 U.S.C.§1415). Specifically, after a complaint regarding a child's identification, evaluation or placement is made, the state must provide the parent/guardian with an impartial due process hearing on these issues (20 U.S.C.§1415(e)(2). This is a limited grant of jurisdiction, however, since it authorizes review only of claims alleging (1) errors in the identification, (2) errors in the evaluation, (3) errors in the placement, (4) denial of the Act's numerous procedural safeguards (20 U.S.C.§1415(e)(2); see also Stuart v. Nappi, F. Supp. 1235 D. Conn. 1978).

The legislative history of P.L. 94-142 and its statutory predecessors share a common trait; namely, ". . . each is devoid of even the slightest suggestion that Congress intended for it to serve as a vehicle through which to initiate a private cause of action for damages" (Loughran v. Flanders, see at EHLR 551:163).

Absent specific authority in a State's Annual Program Plan for implementation of Part B of the Act or rules and regulations promolgated under state statutes that grants a hearing officer jurisdiction beyond that conveyed in 20 U.S.C.§1415 to rule on issues other than those noted above would clearly breach the jurisdiction granted a due process hearing officer.

If a hearing officer comes upon issues that have not been specified in petitioner's prayer, to rule on such issues is clearly beyond the scope of the hearing and should be avoided. Even though the school administrator may privately desire assistance in solving a specific problem, enabling him/her to better provide for the handicapped, a <u>decision on issues not specified</u> in petitioner's prayer not only violates his/her authority but in all probability will infringe upon the prerogatives of the school board.

One method of resolving the use of the due process hearing as an enabling procedure while at the same time protecting the integrity of the hearing officer may be found in one of the sample decisions in Appendix F. Reference is made to a case involving a deaf-blind child who sought weekly transportation from his home to a state operated residential school. While petitioner was concerned about transportation without cost to parents, the school's administrator was privately concerned about the safety of the transportation being provided on a contract basis with a private operator. In this case petitioner's prayer was granted based on the evidence and testimony presented. The child's IEP called for weekly visits to his home. The matter of safety of the services provided on a contract basis was clearly brought out during the course of the hearing. The hearing officer discussed this issue in his findings but did not make a decision or issue an order on this issue. Rather, he called it to the attention of the State Board of Education, under whose aegis the school operated, and strongly suggested that the State Board of Education provide a remedy.

Hearing officers are admonished, however, to use this technique with caution. It is a two-edged sword that should not be unsheathed by the inexperienced.

While answers to the questions proposed at the beginning of this discussion are provided above, the reader is reminded that these questions are only illustrative. There is no substitute for good judgment, experience, and an abundant exercise of caution.

References

1. PARC v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279,282 (E.D. Pa. 1972).

2. Mills v. Board of Educ. of Dist. of Columbia, 348 F. Supp. 866, 871, 875, (D.D.C. 1972).

3. LeBanks v. Spears, 60 F.R.D. 135 (E.D. La. 1973).

4. Education of the Handicapped Law Report.

APPENDIX J

CHALLENGES TO IMPARTIALITY OF HEARING OFFICER

Challenges to Impartiality of Hearing Officer

In Chapter 4 (D) 4 the problem of challenges to the impartiality (or other qualifications) of the hearing officer are discussed briefly. While it is possible that a challenge might be made on the basis of the hearing officers qualifications, this is unlikely given the safeguards and the hearing officer qualifications set forth in Colorado's Plan.

The problem of impartiality may be another matter. Hearing officers have disqualified themselves on the basis of a personal friendship with the district's special education director during college years. Others have disqualified themselves because of their close working relationships with another district in the same area of the state. Some have disqualified themselves on the basis of their bias toward a school's program. There are any number of reasons why a hearing officer might elect to disqualify him/herself.

The Education for All Handicapped Children Act requires that due process hearing officers must be impartial (20 U.S.C. & 1415; 34 CFR, §300.507). If the due process hearing were a "court" procedure rather than an "quasi-legal" process designed to insure full participatory decision making of the parent(s) of a handicapped child, the Rules of Civil Procedure, State Supreme Court cases, or the Code of Judicial Conduct might apply. However, there are no rules concerning disqualification which pertain where the impartiality of a hearing officer has been questioned.

While the Rules of Civil Procedure, State Supreme Court cases or the Code of Judicial Conduct might provide some guidance to a hearing officer called upon to make a decision regarding his/her impartiality, honesty and good judgment are the only guidelines that can be offered at the present time.

When a formal motion has been filed with a hearing officer seeking his/her disqualification, it is important to remember that a response is required and both the motion for disqualification and the hearing officer's response must be made a matter of record. If a proposed hearing officer elects not to hear the case at the outset and prior to the hearing itself, there is no issue. If a proposed hearing officer accepts the case and a motion for disqualification is filed after that time, the hearing officer must insure a complete and accurate record of both the motion and his/her response to it.

A formal motion for disqualification of a hearing officer and the hearing officer's response is found on the following pages.

Ex A1

Confidential

John E.B. Myers
LEGAL CENTER FOR THE HANDICAPPED
Attorneys for Petitioners
455 East 400 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 363-1347

IN THE GRANITE SCHOOL DISTRICT

SALT LAKE COUNTY, STATE OF UTAH

, and
on behalf of
their son, , : MOTION FOR DISQUALIFICATION OF HEARING OFFICER

Petitioners,

vs :

GRANITE SCHOOL DISTRICT,

Respondent. :

COME NOW the Petitioners, by and through their attorney undersigned, and move the Hearing Officer to disqualify himself from sitting as Hearing Officer in the forthcoming due process hearing to be held on behalf of the minor child, . This motion is supported by a Memorandum of Points and Authorities and by the affidavits of Dr. and Mrs. .

DATED this 16 day of April, 1981.

Respectfully submitted,

LEGAL CENTER FOR THE HANDICAPPED

John E.B. Myers
Attorney for Petitioners

J-2

John E.B. Myers
LEGAL CENTER FOR THE HANDICAPPED
Attorneys for Petitioners
455 East 400 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 363-1347

IN THE SCHOOL DISTRICT

SALT LAKE COUNTY, STATE OF UTAH

, and
, on behalf of
their son, , :

Petitioners, MEMORANDUM OF POINTS AND AUTHORITIES

vs :

SCHOOL DISTRICT,

Respondent. :

During the month of December, 1980, a due process hearing on behalf of the minor child, , was held in the Granite School District. The Hearing officer was . The hearing was held on December , 1980, and the Hearing Officer's decision was dated January , 1981.

In the four months which have elapsed since the December, 1980 hearing, a great deal has occurred. In particular, the parties have reached an impass concerning the educational placement of . Because that impass could not be resolved informally, a due process hearing has been requested by Dr. and Mrs. . By letter dated April 3, 1981, District requested that serve as Hearing Officer for the forthcoming hearing.

The United States has adopted Canon 3 as the standard by which to determing whether a federal judge should disqualify himself. (28 U.S.C. §455.) In interpreting the federal rule the Tenth Circuit Court of Appeals, the federal appeals court with jurisdiction over Utah, stated that

> 28 U.S.C. §455 provides that a judge should disqualify himself in any proceeding in which his impartiality "might reasonably be questioned." Hence, appearance of impartiality is virtually as important as the fact of impartiality. (Webbe v. McGhie Land Title Co., 549 F.2d 1358, 1361 (10th Cir. 1977).

In Rice v. McKenzie, 581 F.2d1114, 1116 (4th Cir. 1978), the Court stated that

> The question is not whether the judge is impartial in fact. It is simply whether another, not knowing whether or not the judge is actually impartial, might reasonably question his impartiality on the basis of all the circumstances . . . . [I]f there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case. (emphasis is original.)

The foregoing authorities provide ample support for Petitioners Motion to Disqualify. While it may well be the case that is in fact impartial and unbiased, his deep involvement in the former due process hearing and the content of his Decision and Order raise at least "a reasonable factual basis for doubting the [Hearing Officer's] impartiality." That being the case, he should disqualify himself.

While the rule may not be applicable in the strict sense of the word to present proceeding, it clearly illustrates the policy of the law in Utah. The affidavits filed with the Motion For Disqualification expressly state the belief that has a bias against the personally and about the appropriate outcome of the proceeding. That being so, it is appropriate for him to disqualify himself as the Hearing Officer.

Further support for this argument may be found in a Utah Supreme Court case interpreting Rule 63. In Anderson v. Anderson, 368 P.2d 264, 265 (Utah 1962), the Court stated

> If the rule means anything at all, it means what is plainly stated to the effect that the judge against whom the affidavit of bias and prejudice [is filed] thereafter cannot proceed to hear the issue himself. Our only conclusion is that any order of judgment based on evidence thereafter taken by him would be ineffective against the affiant.

In sum, the policy of Utah law militates in favor of the determination that should disqualify himself.

The American Bar Association Code of Judicial Conduct governs the conduct of judges throughout the United States. Canon 3,C. states:

> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. (emphasis added)

At page 10 it is stated:

> Continued residence in the home of his parents, Dr. and Mrs. , would be detrimental to providing a free appropriate education in the least restrictive environment consistent with Subject's educational needs.

Based upon written Decision, Petitioners argue that it would be impossible for him to be impartial when listening to and evaluating their testimony. His express opinion that they have "contributed significantly" to their son's handicap speaks plainly of his opinions of Dr. and Mrs. . Whether his opinion be correct or not is not the issue. The important consideration is that he has come to certain conclusions which would as a matter of course color his decision-making if he were to sit as Hearing Officer at the forthcoming hearing.

The Education for All Handicapped Children Act required that due process hearing officers must be impartial. (20 U.S.C. §1415; 45 C.F.R. §§121a.506, 121a.507.) In the event a proposed hearing officer is not impartial, voluntary disqualification is in order. While there are no rules concerning disqualification which pertain specifically to the instant case, principles evolved in the courts are instructive.

Rule 63(b) of the Utah Rules of Civil Procedure states:

> Whenever a party to any action or proceeding, civil or criminal, or his attorney shall make and file an affidavit that the judge before whom such action or proceeding is to be tried or heard has a bias or prejudice, either against such party or his attorney or in favor of any opposite party to the suit, such judge shall proceed no further therein, except to call in another judge to hear and determine the matter.

The issues for decision at the upcoming hearing have not yet been clarified with finality. Suffice it to say, for purposes of this argument, that the hearing will not be a continuation or extension of the prior hearing. While much of the same ground will of necessity be covered, many of the issues will be different. For example, new evidence will be adduced concerning 's clinical and academic progress since the prior hearing. Further evidence will be presented regarding the differences between School and other potential educational placements. Importantly, Petitioners intend to put on efidence which will explore some of the ground covered during the prior hearing. This must be done in order to reach a proper decision concerning 's placement.

In order for the Hearing Officer at the forthcoming hearing to render a fair and impartial decision, it is absolutely necessary that he or she approach the case without the burden of preconceived opinions about the issues or the parties. Petitioners respectfully submit that (proposed hearing officer) has such opinions regarding both the issues and the parties. (See attached affidavits.)

A. The Issues.

Having listened to a great deal of evidence relating to issues which will be in some instances very similar or identical to those discussed at the upcoming hearing, it will not be possible for to approach the evidence with an open and neutral mind. This is no disparagement of his integrity, but rather an observation of human nature. Having heard the evidence before him, he reached a decision which he reduced to a written Decision and Order. He has decided that is not an appropriate placement, and that

or a similar setting is. Since the issue of placement will lie at the very heart of the hearing and since decided that issue at the prior hearing, it will not be possible for him to approach the upcoming hearing with the neutrality required of an impartial Hearing Officer. Even if he were able to overcome his prior opinions and determinations to his personal satisfaction, his acting as Hearing Officer would carry with it at least the appearance of partiality. At the very least, his impartiality might reasonably be questioned.

B. The Parties.

Without intending the least disrespect for , Petitioners suggest that he has formed certain opinions regarding their parenting abilities and the home environment which they provide for . These opinions are reflect in his Decision. At page 4 it is stated:

> Hearing Examiner finds that the stressful relationship that exists between parents and child has contributed significantly to subject's handicapping conditions. Hearing Examiner also finds that the lack of consistency in discipline imposed, family "rules", and rigid standards and expectations on the part of the parents all contribute to his present problems.

At page 5 it is stated:

> Hearing Examiner finds that continued confrontations in the home environment will mitigate against his becoming an independent self-sustaining adult capable of making socially acceptable decisions. Further, Hearing Examiner finds that a continuation in his present home environment will contribute to deterioration of his academic progress.

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The foregoing authorities provide ample support for Petitioners Motion to Disqualify. While it may well be the case that is in fact impartial and unbiased, his deep involvement in the former due process hearing and the content of his Decision and Order raise at least "a reasonable factual basis for doubting the (Hearing Officer's) impartiality." That being the case he should disqualify himself.

DATED this _____ day of _____, 1981.

Respectfully submitted,

LEGAL CENTER FOR THE HANDICAPPED

_____

John E. B. Myers
Attorney for Petitioners

John E.B. Myers
LEGAL CENTER FOR THE HANDICAPPED
Attorneys for Petitioner
455 East 400 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 363-1347

IN THE GRANITE SCHOOL DISTRICT

SALT LAKE COUNTY, STATE OF UTAH

---

and
, in behalf
of their son, , :

Petitioners,

AFFIDAVIT OF

vs :

SCHOOL DISTRICT

Respondent. :

STATE OF UTAH)
) ss
COUNTY OF SALT LAKE)

Dr. , having been first duly sworn, deposes and states as follows:

1. I am the adoptive father of .

2. I am a psychologist, holding a Ph.D. degree in that discipline from the University of Utah.

3. I was personally present during the entirety of a due process hearing held on December , 1980, on behalf of my son.

4. It is my opinion that has formed certain conclusions about the appropriate educational placement for . I base

this opinion upon 's remarks at the December, 1980 hearing. It is my opinion that is biased against the School and would not be able to render an impartial decision as to whether or not my son should be placed at that school.

5. It is my opinion that has formed certain conclusions about my parenting abilities and about my involvement, if any, in the etiology of my son's handicap. I base this opinion upon the written statements of in his Decision and Order dated January , 1981. It is my opinion that is biased against me and that that bias would render it impossible for him to evaluate my testimony with impartiality.

Dated this ____ day of April, 1981.

_____

Subscribed and sworn to before me this ____ day of April, 1981.

_____
NOTARY
Residing Worcester County

My commission expires:
2/18/84

John E.B. Myers
LEGAL CENTER FOR THE HANDICAPPED
Attorneys for Petitioners
455 East 400 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 363-1347

IN THE GRANITE SCHOOL DISTRICT

SALT LAKE COUNTY, STATE OF UTAH

---

and :
, in behalf
of their son, ,

Petitioners,

vs AFFIDAVIT OF MRS.

SCHOOL DISTRICT,

Respondent. :

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

, having been first duly sworn, deposes and states as follows:

1. I am the adoptive mother of .

2. I was personally present during the entirety of a due process hearing held on December , 1980, on behalf of my son.

3. It is my opinion that has formed certain conclusions about the appropriate educational placement for Andrew. I base this opinion upon 's remarks at the December, 1980 hearing. It is my opinion that is biased against the School and

would not be able to render an impartial decision as to whether or not my son should be placed at that school.

4. It is my opinion that has formed certain conclusions about my parenting abilities and about my involvement, if any, in the etiology of my son's handicap. I base this opinion upon the written statements of in his Decision and Order dated January , 1981. It is my opinion that is biased against me and that that bias would render it impossible for him to evaluate my testimony with impartiality.

DATED this _____ day of April, 1981.

_____

Subscribed and sworn to before me this _____ day of April, 1981.

_____
NOTARY
Residing Woodside County

My commission expires

2/18/84

MOTION FOR DISQUALIFICATION

, by and through his parents and Counsel of Record, Mr. John E. R. Myers	:	
PETITIONER	:	HEARING EXAMINER'S RESPONSE
-vs-	:	
GRANITE SCHOOL DISTRICT, Mr. Byron Fisher, Counsel of Record	:	
RESPONDENT	:	

Hearing Examiner in the above-referenced matter has examined the motion by Counsel for Petitioner to disqualify himself in the forthcoming hearing to be held on behalf of the minor child .

Having again reviewed the verbatim transcript of the hearing on behalf of PETITIONER held December 15-16, 1980, Hearing Examiner finds ample evidence in the testimony presented at hearing to justify the conclusions of facts, decision, and order rendered under the date of January , .

Hearing Examiner also notes that not infrequently do parties aggrieved as a result of such hearing attribute the result to the bias or prejudice of the Hearing Examiner. Further, Hearing Examiner finds ample evidence and testimony to establish that PETITIONER'S parents placed him first in a foster home and subsequently in the School of their own free will and volition, recognizing a ". . . stressful relationship (did) exist between the parent and child . . ." The affidavits appended to Counsel's motion for disqualification of Hearing Examiner are, therefore, totally unconvincing.

Further, the motion for disqualification argues; that, ". . . the hearing will not be a continuation or extension of the prior hearing." At the same time, it is clear that the central issue is one of placement of PETITIONER

Hearing Examiner finds, therefore, no justification to put on evidence or the taking of additional testimony in order to reach a proper decision concerning PETITIONER'S placement. Hearing Examiner finds, however, that new evidence and new testimony may be appropriately received at the forthcoming hearing because of the time between the original decision and order and the date established for the forthcoming hearing. To try again the same issues would violate the legal principle of res judicata. The decision and order of January , , is binding on all parties concerned. Additionally, the decision and order of January , , was unanimously upheld by a State level review panel. Relief from the decision of January , , can be found in a court of appropriate jurisdiction as provided by P.L. 94-142.

Any hearing regarding the placement of PETITIONER must be based on new evidence and testimony and therefore can only be construed as an extension or continuation. Hearing Examiner's agreement to hear the matter now pending comes solely as a result of RESPONDENT'S request that a hearing be held thereby suggesting justification that new evidence and new testimony are appropriate.

Hearing Examiner will call for a pre-hearing conference with Counsel for both PETITIONER and RESPONDENT prior to the forthcoming hearing in order to clarify all issues to be heard.

Motion for disqualification of hearing officer is hereby denied.

Dated this day of April, 1981

Hearing Officer

APPENDIX K

INSTITUTIONALIZED CHILD'S CLAIM TO SPECIAL EDUCATION

INSTITUTIONALIZED CHILD'S

CLAIM TO SPECIAL EDUCATION-----

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic responsibilities, even service in the armed forces. It is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. Brown v. Board of Education, 347 U.S. 483, 493 (1954).

Inasmuch as all states have compulsory school attendance laws it is incumbent upon juvenile facilities to provide adequate educational programs for residents. The failure to do so is a denial of equal access to a public school education. See generally, National Juvenile Law Center, Law and Tactics in Juvenile Cases, p. 640 (3rd. Ed. 1977). As the Supreme Court stated in Brown:

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id. at 493.

When a juvenile is confined, even temporarily, there is an obvious interruption of his/her education. Incarceration, however, does not relieve the state of its duty to provide education. Rather, because the very purpose of the confinement is to afford needed rehabilitative services, the state has assumed an added obligation to provide a more particularized and intense educational experience designed to meet the individual needs of the confined juvenile.

Notwithstanding the documented importance of education, the primary function of juvenile facilities has traditionally been one of maintenance; "treatment therapy, counseling, schooling, social activities and rehabilitation all stand second in line to claim financial and human resources." (emphasis added) Keenan & Hammond, The Institutionalized Child's Claim to Special Education: A Federal Codification of the Right to Treatment, 56 Detroit J. Urban L. 337 (1979). Moreover, the failure to provide adequate individualized education programming reaches critical proportions since many,

if not most, juveniles who are incarcerated have long standing histories of failure within the educational system. Thus, the absence of adequate educational programming only exascerbates the problem of the confined juvenile.

Recent cases, in recognition of the critical importance of education and the unique educational problems of incarcerated juveniles, have consistently characterized adequate education programming as an integral facet of the juvenile's right to receive rehabilitative services. See: McRedmond v. Wilson. 533 F. 2d 757 (2nd Cir. 1976; Nelson v. Heyne, 491 F. 2d 352 (7th Cir. 1974); Morgan v Sproat, 432 F. Supp. 1130 (S.D. Miss. 1977); Morales v. Truman, 383 F. Supp. 53 (E.D. Tex. 1974); (comprehensive guidelines for academic programming); Martarella v Kelley, 359 F. Supp. 478 (S.D. N.Y. 1973); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354 (D. R. I. 1972), C.A. No. 4529 (D. R. I. Jan. 25, 1979)(final order). Cf.: Santiago V. City of Philadelphia, No. 74-2589 (E. D. Pa., Dec. 22, 1978) (stipulation in partial settlement) (comprehensive educational programming); Inmates of John Connelly Youth Center v. Dukakis, No. 75-1786-G (D. Mass. Apri.2, 1976) (consent judgment) adequate individual educational/tutorial program). In Martarella, for example, the court ordered a "therapeutic living situation. . .including educational. . .services. 359 F. Supp. at 478 (emphasis added). Likewise the court in Morganconcluded that the juvenile's right to treatment includes "an environment which is conducive to rehabilitation as well as sufficient programs, including education, vocational training, and recreation to enable students to obtain necessary skills to return to society". 432 F. Supp. at 1140-41 (emphasis added). Other courts have recognized that the denial of educational rights is punitive. In Affleck, the court stated:

> As to education, there is a bitterly cruel irony in removing a boy from his parents because he is truant from school and then confining him to a small room. . . where he gets no education. . . Inmates confined to. . . (solitary) are entitled to the same education received by inmates at the Training School proper. . . . I find that denying education. . .does not serve any permissible interest. Defendants are enjoined from confining any members of the plaintiff class. . .without providing them education which is equivalent in duration, subject matter, materials, and otherwise, with that provided in the (Training School) proper.

Id. at 1369-70.

As the above cases demonstrate, courts are willing to mandate appropriate academic and vocational programming for confined juveniles. Counsel must be imaginative and aggressive, utilizing experts and other resources available to insure that reasonable, meaningful programs are adopted.

Except for the title all of the above is quoted directly from: Protecting Children Through the Legal System, American Bar Association, Washington, D. C., 1981, p. 343-45.